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Supreme Court of the United States

OCTOBER TERM, 1957

No. 684

D. B. LEWIS, PRESIDENT, LEWIS FOOD COMPANY; HENRY MELLO; MAYNARD (MAC) FOLDEN; ET AL., PETITIONERS,

vs.

NATIONAL LABOR RELATIONS BOARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 23, 1957
CERTIORARI GRANTED JANUARY 27, 1958

No. 15307

United States
Court of Appeals
for the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Appellant,

vs.

D. B. LEWIS, PRESIDENT, LEWIS FOOD COMPANY, et al.,
Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

THEOPHIL C. KAMMHOLZ,
General Counsel,

DANIEL J. HARRINGTON,
Chief Law Officer,

E. DON WILSON,
Attorney,

National Labor Relations Board,
Twenty-First Region,
111 West Seventh Street,
Los Angeles 14, California

For Appellee:

HILL, FARRER & BURRILL,

RAY L. JOHNSON, JR.,
411 West 5th Street,
Los Angeles 13, California

G. A. SHEPPARD,
Law Offices, Alva Baird,
458 South Spring Street,
Los Angeles 13, California [1]*

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In the United States District Court, Southern District of California, Central Division

Civil No. 20119-TC

NATIONAL LABOR RELATIONS BOARD,
Applicant,

v.

D. B. LEWIS, PRESIDENT, LEWIS FOOD COMPANY; HENRY MELLO; MAYNARD (MAC) FOLDEN; GRAMMONT BANVILLE; JOE LOERA; ANASTACIO HOLQUIN; WILLIAM L. (ROY) MILLER; OTTO SCHUBERT; WALTER O. LISSER; AND WALTER SCHMIDT, SECRETARY-TREASURER OF ASSOCIATION OF INDEPENDENT WORKERS OF AMERICA,
Respondents.

APPLICATION FOR ORDER REQUIRING OBEDIENCE TO SUBPENAS AD TESTIFICANDUM AND DUCES TECUM

To the Honorable, the Judges of the United States District Court for the Southern District of California, Central Division.

The National Labor Relations Board, hereinafter referred to as the Board, an administrative agency of the Federal Government created pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. V. Sec. 151, et seq.), hereinafter referred to as the Act, by its General Counsel

and by Daniel J. Harrington, its Chief Law Officer for the Twenty-First Region, respectively, applies to this Honorable Court pursuant to Section 11(2) of the Act, for an order requiring D. B. Lewis, President, Lewis Food Company; Henry Mello; Maynard (Mac) Folden; Grammont Banville; Joe Loera; Anastacio Holquin; William L. (Roy) Miller; [2] Otto Schubert; Walter O. Lisser and Walter Schmidt, Secretary-Treasurer of Association of Independent Workers of America, to obey certain subpenas issued by the Board and duly served upon them in the manner provided by law. In support of said application, upon information and belief, the Board respectfully shows as follows:

1. This Court has jurisdiction of the subject matter of the proceeding, and of the Respondents, by virtue of Section 11(2) of the Act, in that the inquiry in aid of which the subpenas were issued was carried on within this judicial district, and Respondents all reside and do business in this judicial district.

2. Pursuant to the provisions of Section 6 of the Act, the Board has issued Rules and Regulations, Series 6, as amended, effective June 3, 1952, hereinafter referred to as the Rules, governing the conduct of its operations, which Rules have been duly published in the Federal Register (17 F.R. 4982), as provided for in the Administrative Procedure Act (5 U.S.C. 1002). This Court may take judicial notice of said Rules by virtue of the provisions of 44 U.S.C. 307.

3. Pursuant to the provisions of Section 10 (b) of the Act, there are now pending before the Board three unfair labor practice proceedings entitled Lewis Food Company, Cases Nos. 21-CA-2061 and 21-CA-2203, and Association of Food Handlers, a/k/a Association of Pet Food Manufacturing Employees, a/k/a Association of Pet Food Manufacturers Employees, a/k/a Association of Independent Workers, Case No. 21-CB-708, respectively, wherein Charges and an Amended Charge have been filed and served, an Order Consolidating Cases and Notice of Hearing and a Consolidated Complaint have issued, Answers have been filed and Bills of Particulars have been filed, all in the manner and form required by law and by Sections 102.9, 102.10, 102.15, 102.20 and 102.33 of the Board's Rules. Copies of said Charges, Amended Charge, Order Consolidating Cases and Notice of Hearing, Consolidated Complaint, Answers and Bills of Particulars are annexed hereto and made a part hereof, designated Exhibits A, B, C, D, E, F, G, H, I and [3] J, respectively.

4. In relation to the proceedings described in paragraph 3, above, the Board did cause to be issued at the written request of counsel for General Counsel on June 4, 1956, subpenas ad testificandum directed to Joe Loera, Anastacio Holquin, William L. (Roy) Miller, Otto Schubert, Walter O. Lisser, Henry Mello and Maynard (Mae) Folden, requiring said Respondents to appear and testify at a hearing before a Trial Examiner of the Board on June 11,

1956, at 10:00 o'clock in the morning, at Room 704, 111 West Seventh Street, Los Angeles, California, and the Board did cause to be issued at the written request of counsel for the General Counsel on June 5, 1956, a subpena ad testificandum directed to Grammont Banville, requiring said Respondent to appear and testify at a hearing before a Trial Examiner of the Board on June 12, 1956, at 9:30 o'clock in the morning, at Room 704, 111 West Seventh Street, Los Angeles, California, and the Board did cause to be issued at the written request of counsel for General Counsel on June 1, 1956, subpenas duces tectum directed to Walter Schmidt, Secretary-Treasurer of Association of Independent Workers of America, and D. B. Lewis, President, Lewis Food Company, requiring said Respondents to appear before a Trial Examiner of the Board on June 11, 1956, at 10:00 o'clock in the morning, at Room 704, 111 West Seventh Street, Los Angeles, California, and to then and there give testimony and produce certain records and papers more fully described and particularized in said subpenas duces tecum. All said subpenas were issued under the authority and form provided for in Section 11(1) of the Act and Section 102.31(a) of the Rules. Said subpenas were duly served upon Respondents by registered mail in the manner provided for in Section 11(4) of the Act and Section 102.80 of the Rules. Copies of these subpenas directed to all Respondents are attached hereto and marked Exhibits K, L, M, N, O, P, Q, R, S and T, respectively.

5. Pursuant to Section 11(1) of the Act and Sec-

tion 102.31(b) of the Rules, all Respondents, through counsel, did on June 11, 1956, [4] file with the Regional Director of the Twenty-First Region of the Board Petitions to Revoke Subpenas on certain grounds therein set forth, which Petitions were referred by the Regional Director by formal Orders, issued on June 11, 1956, to the Trial Examiner for ruling. On June 11, 1956, the Trial Examiner considered the Petitions to Revoke Subpenas, supporting memoranda, and heard argument, and denied said Petitions. Copies of said Petitions to Revoke Subpenas, of said Orders of the Regional Director and that portion of the transcript wherein the Trial Examiner heard argument and denied the Petitions are annexed hereto and marked Exhibits U, V, W, X, Y, Z and AA, respectively.

6. Although the Trial Examiner denied the Petitions to Revoke Subpenas Ad Testificandum, Respondents who were so subpenaed failed to appear at said hearing at the time and place set out in the subpenas and to then and there give testimony. Although the Trial Examiner denied the Petitions to Revoke the Subpenas Duces Tecum, Respondents so subpenaed failed to appear at said hearing in response to said subpenas and to testify and to produce the evidence as therein called for and as required by the terms of said subpenas duces tecum and have at all times since failed and refused and continue to fail and refuse to produce the records and documents called for in said subpenas and to testify.

7. At said hearing as more fully shown in the

partial transcript of hearing, counsel for Respondents stated that they would advise their clients not to appear and testify or produce records on the grounds that the subpenas were void.

8. The refusal of Respondents to appear and testify and/or to produce the required records in obedience to the subpenas, which testimony and records are relevant to the investigation and to the issues in the proceedings before the Board, constitutes contumacious conduct within the meaning of Section 11(2) of the Act, which conduct has impeded and continues to impede the Board in the investigation of the matters before it and has prevented and is preventing the Board from [5] carrying out its duties and functions under the Act.

9. No previous application has been made for the relief requested herein.

Wherefore, the Applicant, the National Labor Relations Board, respectfully prays:

(a) That an order be issued forthwith directing Respondents Henry Mello, Maynard (Mac) Folden, Grammont Banville, Joe Loera, Anastacio Holquin, William L. (Roy) Miller, Otto Schubert and Walter O. Lisser to appear before Wallace Royster, the Trial Examiner designated by the Board in Cases Nos. 21-CA-2061, 21-CA-2203 and 21-CB-708, pending before said Board, at such time and place as said Trial Examiner may designate, and there give testimony and answer any and all questions which may be propounded to them in connection with the matters under investigation and in question in said

proceedings before the Board, and further directing that Respondents D. B. Lewis, President of Lewis Food Company, and Walter Schmidt, Secretary-Treasurer of Association of Independent Workers of America, appear before Wallace Royster, the Trial Examiner designated by the Board in Cases Nos. 21-CA-2064, 21-CA-2203 and 21-CB-708, pending before said Board, at such time and place as said Trial Examiner may designate, and there and then testify and answer any and all questions which may be propounded to them in connection with the proceedings before the Board and, in addition, to then and there produce the records described in Exhibits K and T.

(b) That the costs of this proceeding be taxed and adjudged against Respondents, together with such other sum as will reasonably compensate the National Labor Relations Board as an agency of the United States Government for the expenses and costs actually incurred in connection with the prosecution of this proceeding to compel obedience to subpenas of the National Labor Relations Board.

(c) That the Applicant, National Labor Relations Board, [6] have such other, further and different relief as to the Court may seem necessary and appropriate.

Dated at Los Angeles, California, this 29th day of June, 1956.

NATIONAL LABOR RELATIONS BOARD,

/s/ By THEOPHIL C. KAMMHOLZ,

General Counsel

/s/ DANIEL J. HARRINGTON,
Chief Law Officer, Twenty-First Region

/s/ E. DON WILSON,
Attorney [7]

EXHIBIT A

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Case No.: 21-CA-2061. Date Filed: 8-27-54. Compliance Status Checked By: /s/ HA.

1. Employer Against Whom Charge Is Brought: Lewis Food Company.

Address of Establishment: 817 East 8th Street, Los Angeles, California.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a), subsections (1) and 8 (a) 2 of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge:

The following persons were discharged for Union activity and specifically because they had made application to join Local Union No. 626:

Joseph Flores—1203 West 31st Street, Los Angeles 7, California.

Applied for membership about August 7th. Had worked at plant 60 days without any complaint

whatever on his work. The guard at the door who admits employees, had a list, upon which was marked the names of certain people to be discharged. As they entered the plant, the guard checked this list, and from this check directed them to the office to be discharged.

Jesus Carabajal—641 N. Merida Avenue, Los Angeles 22, California.

Employed six months—applied for Union membership about August 1st; discharged about August 15th. No complaints whatever on his work. Guard instructed him to pick up final check.

Antonio Flores—5912 Woodlawn Avenue, Los Angeles, California.

Employed three and one-half years—no complaints on his work. Applied for membership with the Union about July 15th; discharged Monday, August 8th, after meeting of employees in Teamsters' group the previous Friday. Taken to office by Nathan Lewis, brother of the plant owner, and Joe Luera, Foreman, from his machine while working about 3:30 P. M. No complaints on work. This man, while waiting in the office, overheard the President of the Company Association, Walt Smith, talking to the owners in an adjoining room. Smith told the owner they were going to fire all the men who had joined the Teamsters' Union, and that five or six men were on the list for discharge the next day. Smith was telling the members who to fire.

Salvadore Jiminez—824 E. 18th Street, Los Angeles 21, California.

Worked at Lewis six years and five months.

About four days prior to August 14th, was requested to break in a new man for four days, and applied for membership in the Union in July—discharged on August 14th.

Lewis Perez—2843 Blanchard Street, Los Angeles 33, California.

Employed 14 months. Filed Union application about August 7th; discharged August 11th. No complaints on his work. Was told nothing as cause for discharge. Guard instructed him to go to the office after consulting a list which he had containing names of men to be fired. The guard said: "You are one of them—go to the office." Employer had him break in a man on his machine the day previous.

Jesus Serrano—5847 S. Denver Avenue, Los Angeles 44, California.

Employed two months—no complaints on work. Applied for membership on August 11th—discharged two days later, on August 13th. Foreman Joe Luera gave no reason for discharge, simply stated he had replacement for him. Following these discharges, workers struck on August 19th, in protest against discharges for Union activity, and have picketed ever since.

Wednesday, August 25th:

Company fired 20 strikers as they came into the plant to get their pay checks. In the succeeding three days, as strikers went to get their checks, 25 more were discharged. Horace Lewis, brother of owner in charge of warehouse, came out to picket line and asked two employees to return to work on Thursday, August 26th. These men did not return

to work. They were Jose Vracamonte of 3339 E. 4th Street, Los Angeles, California, and Casmiro Lovato Jr., of 3011 E. 5th Street, Los Angeles, California.

This strike is solely in protest against unfair labor practices in discharges. [9]

3. Full name of Party Filing Charge: Meat & Provision Drivers, Local Union No. 626.

4. Address: 846 South Union Avenue, Los Angeles, California. Telephone No.: DU. 7-3359.

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit: International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A.F.L.

6. Address of National or International, if any: 100 Indiana Avenue, N.W., Washington, D. C.

7. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

Date: August 27th, 1954.

/s/ By CHARLES RICO,
Business Representative of
Local 626 [8]

EXHIBIT B

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Case No.: 21-CA-2203. Date Filed: 3-29-55.

1. Employer Against Whom Charge Is Brought: Lewis Food Company.

Number of workers employed: 500.

Address of establishment: 817 East 18th Street, Los Angeles 21, California.

Type of establishment: Cannery.

Identify principal product or service: Animal food.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (2) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge:

The above-named Employer, acting through its agents, officers and employees, discharged the undersigned on March 24, 1955, because of his complaint to the Association of Food Handlers concerning their deduction of dues and initiation fees before the undersigned had completed 30 days of work for the Employer, all in violation of Section 8 (a) (1) and (3) of the Act. The Secretary of the

Association of Food Handlers is employed by the Lewis Food Company as a supervisor in violation of Section 8 (a) (2) of the Act.

By these and other acts, said Employer has interfered with, restrained and coerced its employees in their rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge: Otto A. Roth.

4. Address: 15619 Septo Street, San Fernando, California. Telephone No. (None).

* * * * *

7. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

Date: March 29, 1955.

/s/ By OTTO A. ROTH
An Individual [10]

EXHIBIT C

FIRST AMENDED CHARGE AGAINST EMPLOYER

Case No.: 21-CA-2203. Date Filed: 6/24/55.

1. Employer Against Whom Charge Is Brought: Lewis Food Company.

Number of Workers Employed: 500.

Address of Establishment: 817 East 18th Street, Los Angeles 21, California.

Type of Establishment: Cannery.

Identify Principal Product or Service: Animal Food.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (2) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge:

The above-named Employer, acting through its agents, officers and employees, discharged the undersigned on March 24, 1955, because of his complaint to the Association of Food Handlers concerning their deduction of dues and initiation fees before the undersigned had completed 30 days of work for the Employer, all in violation of Section 8(a) (1) and (3) of the Act. The Secretary of the Association of Food Handlers is employed by the Lewis Food Company as a supervisor in violation of Section 8(a) (2) of the Act.

The Employer, acting through its agents and supervisors, has since October 1, 1954, and at various times previous thereto, and at all times since, interfered with the formation and administration of the Association of Food Handlers, has dominated the administration of the Association of Food Handlers, and has contributed financial support to it, in violation of Section 8 (a) (2) of the Act.

By these and other acts, said Employer has interfered with, restrained and coerced its employees in their rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge: Otto A. Roth.

4. Address: 15619 Septo Street, San Fernando, California. Telephone No.: (None).

* * * * *

7. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

/s/ By OTTO A. ROTH
An Individual [11]

EXHIBIT D

United States of America
National Labor Relations Board

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

Case No.: 21-CB-708. Date Filed: 3/29/55.

1. Labor Organization or Its Agents Against Which Charge Is Brought: Association of Food Handlers.

Address: 817 East 18th Street, Los Angeles 21, California.

The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of Section 8 (b) subsection(s) (1) (A) and (2) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge:

The above-named Labor Organization, acting through its officers, agents and employees, caused the Lewis Food Company to discharge the undersigned on March 24, 1955, because of his complaint to the Union concerning deduction of dues and initiation fees prior to his being employed by the Employer for a period of 30 days.

By these and other acts, said Labor Organization has restrained and coerced the employees of Lewis Food Company in their rights guaranteed in Section 7 of the Act.

3. Name of Employer: Lewis Food Company.

4. Location of Plant Involved: 817 East 18th Street, Los Angeles 21, California.

5. Type of Establishment: Cannery.

6. Identify Principal Product or Service: Animal Food.

7. No. of Workers Employed: 500.

8. Full Name of Party Filing Charge: Otto A. Roth.

9. Address of Party Filing Charge: 15619 Septo Street, San Fernando, California.

10. Telephone No.: (None).

11. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

Date: March 29, 1955.

/s/ By OTTO A. ROTH.
An Individual [12]

EXHIBIT E

United States of America
Before The National Labor Relations Board
Twenty-First Region

Case No. 21-CA-2061

LEWIS FOOD COMPANY and MEAT AND PROVISION DRIVERS, LOCAL UNION NO. 626, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO.

Case No. 21-CA-2203

LEWIS FOOD COMPANY and OTTO A. ROTH, An Individual.

Case No. 21-CB-708

ASSOCIATION OF FOOD HANDLERS, a/k/a ASSOCIATION OF PET FOOD MANUFACTURING EMPLOYEES, a/k/a ASSOCIATION OF PET FOOD MANUFACTURERS EMPLOYEES, a/k/a ASSOCIATION OF INDEPENDENT WORKERS and OTTO A. ROTH, An Individual.

ORDER CONSOLIDATING CASES AND NOTICE OF HEARING

The General Counsel for the National Labor Relations Board having duly considered the matter and deeming it necessary in order to effectuate the

purposes of the National Labor Relations Act, as amended, and to avoid unnecessary costs or delay,

Hereby orders, pursuant to Section 102.33 (b) of the National Labor Relations Board Rules and Regulations, Series 6, as amended, that these cases be, and they hereby are, consolidated. [13]

Please Take Notice that on the 28th day of May, 1956, at 10:00 a.m., D.S.T., in Room 704, 111 West Seventh Street, Los Angeles, California, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Consolidated Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Copies of the Charges upon which the Consolidated Complaint is based are attached hereto.

You are further notified that, pursuant to Section 102.20 of the Board's Rules and Regulations, you shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an answer to the said Consolidated Complaint within ten (10) days from the service thereof and that unless you do so all of the allegations in the Consolidated Complaint shall be deemed to be admitted as true and may be so found by the Board.

In Witness Whereof, the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused this Consolidated Complaint and Order Consolidating Cases and Notice of Hearing

to be signed by the Regional Director for the Twenty-First Region on this 30th day of April, 1956.

[Seal] /s/ HENRY W. BECKER,
Regional Director, National Labor Relations Board,
Twenty-First Region. [14]

EXHIBIT F

[Title of Board and Causes.]

CONSOLIDATED COMPLAINT

It having been charged by the Meat and Provision Drivers, Local Union No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, hereinafter referred to as the Union, and by Otto A. Roth, an individual, that Lewis Food Company, hereinafter referred to as the Employer, and the Association of Food Handlers, also known as Association of Pet Food Manufacturing Employees, also known as Association of Pet Food Manufacturers Employees, and also known as Association of Independent Workers, hereinafter referred to as the Association, and each of them, have engaged in and are engaging in certain unfair labor practices affecting commerce as set forth and defined in the [15] National Labor Relations Act, as amended, Public Law 101, 80th Congress, First Session, hereinafter called the Act, and the General Counsel of the National Labor Relations Board, on behalf of the Board, having issued an Order of Consolidation, the Regional

Director for the Twenty-First Region, designated by the Board's Rules and Regulations, Series 6, as amended, Section 102.15, hereby issues this Consolidated Complaint and alleges as follows:

1. The Employer, a California corporation, is engaged at Los Angeles, California, in the manufacture of pet foods. The Employer annually sells and ships products valued at in excess of $250,000 from its Los Angeles, California, plant to points and places outside the State of California.

2. The Employer is, and at all times material herein has been, engaged in commerce within the meaning of the Act.

3. The Union is a labor organization within the meaning of Section 2, subsection (5) of the Act.

4. The Association is a labor organization within the meaning of Section 2, subsection (5) of the Act.

5. On or about March 23, 1955, the Association, through its officer, Walter Schmidt, restrained and coerced Otto A. Roth, an employee of the Employer, in the exercise of his right under Section 7 of the Act to refrain from joining or assisting the Association and to bargain collectively through the Association and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection in that, among other things, the Association, through its officer, Walter Schmidt, caused the Employer to deduct from the wages of said Otto A. Roth an initiation fee and

dues against the will of Otto A. Roth and although said Roth had been employed less than 30 days.

6. On or about March 24, 1955, the Association, through said Walter Schmidt, caused the Employer to discharge Otto A. Roth for the purpose of encouraging membership in the Association and because he complained about and demanded the return of the aforesaid deductions from his wages.

7. On or about March 23, 1955, the Employer discriminated in regard to the terms and conditions of employment of Otto A. Roth for the purpose of encouraging membership in the Association by deduction from Otto A. Roth's wages an initiation fee and dues for the Association against the will of said Otto A. Roth and although said Roth had been employed less than 30 days, and contrary to the rights guaranteed to Otto A. Roth in Section 7 of the Act.

8. On or about March 24, 1955, the Employer, through its agent, Walter Schmidt, and its agent, Henry Mello, discharged Otto A. Roth for the purpose of encouraging membership in the Association and, more particularly, because said Otto A. Roth complained that an initiation fee and dues had been deducted by the Employer, at the demand of the Union, from his wages against his will and although he had been employed less than 30 days and because he sought to exercise rights guaranteed to him by Section 7 of the Act.

9. The Employer, since on or about January 1952, has dominated and interfered with the forma-

tion and administration of the Association and has contributed financial and other support to the Association.

10. The Employer, since on or about February 27, 1954, to date, has dominated, assisted, contributed to the support of, and interfered with the administration of the Association.

11. By the acts set forth in paragraphs 5 and 6 above, the Association did engage in and is engaging in unfair labor practices within the meaning of Section 8 (b), subsection (1) (A) and subsection (2) of the Act.

12. By the acts set forth in paragraphs 7 and 8 above, the Employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a), subsections (1), (2) and (3) of the Act.

13. By the acts set forth in paragraph 10 above, the Employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a), subsections (1) and (2) of the Act. [17]

14. The activities of the Association set forth in paragraphs 5 and 6 above, occurring in connection with the Employer's operations described in paragraph 1 above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states of the United States and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

15. The activities of the Employer set forth in paragraphs 7, 8 and 10 above, occurring in connection with the Employer's operations described in paragraph 1 above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states of the United States and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

16. The aforesaid acts of the Employer, as described above, constitute unfair labor practices within the meaning of Section 8 (a), subsections (1), (2) and (3), and Section 2, subsections (6) and (7) of the Act.

17. The aforesaid acts of the Association, as described above, constitute unfair labor practices within the meaning of Section 8 (b), subsections (1) (A) and (2), and Section 2, subsections (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twenty-First Region, on this 30th day of April 1956, issues this Consolidated Complaint against the above-named Employer and Association, Respondents herein.

[Seal] /s/ HENRY W. BECKER,
Regional Director, National Labor Relations Board,
Twenty-First Region. [18]

[Title of Board and Causes.]

EXHIBIT G

ANSWER OF LEWIS FOOD COMPANY

Without waiving its right to make motions or to make objections to rulings upon motions in connection with the foregoing proceedings, Lewis Food Company does file its Answer and admits, denies and alleges as follows:

I.

Lewis Food Company admits the allegations of Paragraphs 1, 2, 3 and 4 of the Complaint.

II.

Lewis Food Company denies, generally and specifically, [19] each and every one of the allegations of Paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the Complaint.

Wherefore, Lewis Food Company prays that the National Labor Relations Board take nothing by this Complaint.

Dated: May 21, 1956.

WILLIAM H. WILSON,
HILL, FARRER & BURRILL,
/s/ By RAY L. JOHNSON, JR.,
Attorneys for Lewis Food Company

Certificate of Service Attached. [20]

[Title of Board and Causes.]

EXHIBIT H

ANSWER

Comes now the Association of Food Handlers, aka Association of Pet Food Manufacturing Employees, aka Association of Pet Food Manufacturers Employees, aka Association of Independent Workers, hereinafter designated as "the Association", and files its answer to the consolidated complaint; admits, denies and alleges as follows: [21]

I.

That the Association is without knowledge as to paragraphs 1, 2, 3, 7, 8, 12, 16 and that portion of paragraph 15 which refers to paragraphs 7 and 8, and on this ground denies generally and specifically the charges in the consolidated complaint.

II.

Denies generally and specifically paragraphs 5, 6, 9, 10, 11, 13, 14, 17 and that portion of paragraph 15 which refers to paragraph 10, of the consolidated complaint.

Wherefore, respondent prays that the consolidated complaint be dismissed, and for such other further relief as the Board deems just and proper.

Dated: May 21, 1956.

LAW OFFICES, ALVA C. BAIRD,
/s/ By THOMAS A. BAIRD,
Attorneys for the Association

[Title of Board and Causes.]

EXHIBIT I

BILL OF PARTICULARS

In compliance with the Order of Trial Examiner Herman Marx, dated May 14, 1956, Counsel for General Counsel furnishes to the Respondent, Lewis Food Company, the following particulars:

1. Respondent Lewis Food Company, through its officers and agents, D. B. Lewis, W. J. Stratton, Horace Lewis, William Wilson and Gerald Riley, conceived the idea of forming and actively participated in forming and bringing into existence the Association.

2. Respondent Lewis Food Company, through its officers and agents, D. B. Lewis, W. J. Stratton, Anastácio Holquin, James Elliott, Albert Saavedra, Joseph Loera, V. E. Thrailkill, M. S. Bjorlin, Albert Blalock, Walter Schmidt, John Ball, Grammont Banville, William Davidson, Maynard Folden, Henry Mello, Dave Russell, A. Sherratt, Nathan Lewis and others whose names are at this time unknown to Counsel for the General Counsel, has since the formation of the Association in January 1952, to date, actively participated in managing, directing, controlling and [23] administering the affairs, activities and policies of the Association and has made available to the Association the Respondent's facilities and services and has conditioned hiring on the signing of applications for membership in the Association and requests for

deduction by the Respondent of initiation fees and dues for the Association and has deducted dues and initiation fees for the Association from the wages of Otto A. Roth, DeWitt Chapman and John J. Charles and other employees whose names are at this time unknown to Counsel for the General Counsel, although said employees had been employed less than 30 days and did not authorize said deductions.

Dated at Los Angeles, California, this 16th day of May 1956.

/s/ E. DON WILSON,
Counsel for the General Counsel, National Labor Relations Board. [24]

EXHIBIT J

[Title of Board and Causes.]

BILL OF PARTICULARS

In compliance with the Order of Trial Examiner Herman Marx, dated May 14, 1956, Counsel for General Counsel furnishes to the Respondent, the Association, the following particulars:

1. Included in the phrase "among other things" in paragraph 5 of the Consolidated Complaint is the conduct of the Association in restraining and coercing Otto A. Roth, DeWitt Chapman and John J. Charles, employees of the Employer, in the exercise of their rights under Section 7 of the Act, in that the Association, through its officer, Walter Schmidt, caused the Employer to deduct from the

cases of said DeWitt Chapman and John J. Charles initiation fees and dues against their wills and although each had been employed less than 30 days.

Dated at Los Angeles, California, this 16th day of May 1956.

/s/ E. DON WILSON,
Counsel for the General Counsel, National Labor Relations Board. [25]

EXHIBIT K

United States of America
National Labor Relations Board

SUBPENA DUCES TECUM

To: D. B. Lewis, President; Lewis Food Company
817 East 18th Street
Los Angeles 21, California

Request therefor having been duly made by E. Don Wilson, Counsel for General Counsel, National Labor Relations Board, whose address is 111 W. Seventh Street, Los Angeles, California,

You are hereby required and directed to appear before a Trial Examiner of the National Labor Relations Board, at Room 704, 111 W. Seventh Street, in the City of Los Angeles, California, on the 11th day of June, 1956, at 10:00 o'clock a.m. of that day to testify in the Matter of Lewis Food Company, et al; and Meat and Provision Drivers, Local Union No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and

Helpers of America, AFL-CIO, et al., Cases Nos. 21-CA-2061, et al.

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

1. Termination Notice, dated on or about August 16, 1954, for Jesus Carabajal.

2. Termination Notice, dated on or about August 13, 1954, for Jesus Serrano.

3. Termination Notice, dated on or about January 17, 1952, for Arnold Gomez.

4. Payroll records showing the dates when Walter Gorablenkow, DeWitt Chapman, John Charles, Otto Roth, Daniel Turk, James Aitken and Ivan Maier began working for Lewis Food Company and the dates when initiation fees and/or dues for the Association were deducted from their pay, if such initiation fees and/or dues were deducted.

5. The applications for employment at Lewis Food Company made by Otto Roth, Walter Gorablenkow, DeWitt Chapman, John Charles, Daniel Turk, James Aitken and Ivan Maier in 1954 or 1955 and application for employment made by Jose Flores in 1954.

6. Termination Notices for Elmer Hadley and C. E. Straiton, dated on or about December 27, 1954 and Termination Notice for Otto Ziemendorf, dated on or about February 27, 1955.

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Los

Angeles, California, this 1st day of June, 1956.

[Seal] Abe Murdock [26]

B-28669.

Received from the Postmaster the Registered or Insured Article, the number of which appears on the face of this return receipt. 1. D. B. Lewis. 2. H. W. Lewis. Date of delivery: June 2, 1956. [28]

EXHIBIT L

United States of America
National Labor Relations Board

SUBPENA

To: Henry Mello
4941 Weik Avenue
Bell, California

Request therefor having been duly made by E. Don Wilson, Counsel for General Counsel, National Labor Relations Board, whose address is 111 W. Seventh Street, Los Angeles, California,

You are hereby required and directed to appear before a Trial Examiner of the National Labor Relations Board, at Room 704, 111 West Seventh Street, in the City of Los Angeles, California, on the 11th day of June, 1956, at 10:00 o'clock a.m. of that day, to testify in the Matter of Lewis Food Company, et al. and Meat and Provision Drivers, Local Union No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, et al., Cases Nos. 21-CA-2061, 21-CA-2203, 21-CB-708.

In testimony whereof, the seal of the National

Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Los Angeles, California, this 4th day of June, 1956.

[Seal] Abe Murdock [28-A]

A-77950.

Received from the Postmaster the Registered or Insured Article, the number of which appears on the face of this return receipt. 1. Henry Mello. 2. Leonilda Mello. Date of delivery June 5th, 1956.

EXHIBIT M

United States of America
National Labor Relations Board

SUBPENA

To: Maynard (Mac) Folden
414 James Street
Los Angeles, California

Request therefor having been duly made by E. Don Wilson, Counsel for General Counsel, National Labor Relations Board, whose address is 111 W. Seventh Street, Los Angeles, California,

You are hereby required and directed to appear before a Trial Examiner of the National Labor Relations Board, at Room 704, 111 West Seventh Street, in the City of Los Angeles, California, on the 11th day of June, 1956, at 10:00 o'clock a.m. of that day, to testify in the Matter of Lewis Food Company, et al. and Meat and Provision Drivers, Local Union No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers

of America, AFL-CIO, et al., Cases Nos. 21-CA-2061, 21-CA-2203, 21-CB-708.

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Los Angeles, California, this 4th day of June, 1956.

[Seal] Abe Murdock [30]

A-77954.

Received from the Postmaster the Registered or Insured Article, the number of which appears on the face of this return receipt. 1. Maynard Folden. 2. Billie Folden. Date of delivery 6-5-56. [31]

EXHIBIT N

United States of America
National Labor Relations Board

SUBPENA

To: Grammont Banville
7810 Osage Avenue
Los Angeles, California

Request therefor having been duly made by E. Don Wilson, Counsel for General Counsel, National Labor Relations Board, whose address is 111 W. Seventh Street, Los Angeles, California,

You are hereby required and directed to appear before a Trial Examiner of the National Labor Relations Board, at Room 704, 111 West Seventh Street, in the City of Los Angeles, California, on the 12th day of June, 1956, at 9:30 o'clock a.m. of that day, to testify in the Matter of Lewis Food

Company, et al. and Meat and Provision Drivers, Local Union No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, et al., Cases Nos. 21-CA-2061, 21-CA-2203, 21-CB-708.

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Los Angeles, California, this 5th day of June, 1956.

[Seal] Abe Murdock [32]

A-77961.

Received from the Postmaster the Registered or Insured Article, the number of which appears on the face of this return receipt. 1. Grammont Banville. 2. Mrs. Stella M. Banville. Date of delivery June 6, 1956. [32A]

EXHIBIT O

United States of America

National Labor Relations Board

SUBPENA

To: Joe Loera

1537 E. 90th Street

Los Angeles, California

Request therefor having been duly made by E. Don Wilson, Counsel for General Counsel, National Labor Relations Board, whose address is 111 W. Seventh Street, Los Angeles, California,

You are hereby required and directed to appear before a Trial Examiner of the National Labor

Relations Board, at Room 704, 111 West Seventh Street, in the City of Los Angeles, California, on the 11th day of June, 1956, at 10:00 o'clock a.m. of that day, to testify in the Matter of Lewis Food Company, et al. and Meat and Provision Drivers, Local Union No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, et al., Cases Nos. 21-CA-2961, 21-CA-2203, 21-CB-708.

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Los Angeles, California, this 4th day of June, 1956.

[Seal] Abe Murdock [33]

A-77955.

Received from the Postmaster the Registered or Insured Article, the number of which appears on the face of this return receipt. I. Ramona Leora. Date of delivery 6/5/56. [33A]

EXHIBIT P

United States of America
National Labor Relations Board

SUBPENA

To: Anastacio Holquin
530 S. Kern Street
Los Angeles, California

Request therefor having been duly made by E. Don Wilson, Counsel for General Counsel, National

Labor Relations Board, whose address is 111 W. Seventh Street, Los Angeles, California,

You are hereby required and directed to appear before a Trial Examiner of the National Labor Relations Board, at Room 704, 111 West Seventh Street, in the City of Los Angeles, California, on the 11th day of June, 1956, at 10:00 o'clock a.m. of that day, to testify in the Matter of Lewis Food Company, et al. and Meat and Provision Drivers, Local Union No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, et al., Cases Nos. 21-CA-2061, 21-CA-2203, 21-CB-708.

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Los Angeles, California, this 4th day of June, 1956.

[Seal] Abe Murdock [34]

A-77952.

Received from the Postmaster the Registered or Insured Article, the number of which appears on the face of this return receipt. I. Anastacio Holquin. Date of delivery. June 5, 1956. [34A]

EXHIBIT Q

United States of America
National Labor Relations Board

SUBPENA

To: William L. (Roy) Miller
6226 Henrilee Street
Lakewood, California

Request therefor having been duly made by E. Don Wilson, Counsel for General Counsel, National Labor Relations Board, whose address is 111 W. Seventh Street, Los Angeles, California,

You are hereby required and directed to appear before a Trial Examiner of the National Labor Relations Board, at Room 704, 111 West Seventh Street, in the City of Los Angeles, California, on the 11th day of June, 1956, at 10:00 o'clock a.m. of that day, to testify in the Matter of Lewis Food Company, et al. and Meat and Provision Drivers, Local Union No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, et al., Cases Nos. 21-CA-2061, 21-CA-2203, 21-CB-708.

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Los Angeles, California, this 4th day of June, 1956.

[Seal] Abe Murdock [35]

A-77951.

Received from the Postmaster the Registered or Insured Article, the number of which appears on

the face of this return receipt. 1. William L. Roy Miller. Date of delivery 6/5/56. [36]

EXHIBIT R

United States of America
National Labor Relations Board

SUBPENA

To: Otto Schubert
853 El Paso Drive
Los Angeles, California

Request therefor having been duly made by E. Don Wilson, Counsel for General Counsel, National Labor Relations Board, whose address is 111 W. Seventh Street, Los Angeles, California,

You are hereby required and directed to appear before a Trial Examiner of the National Labor Relations Board, at Room 704, 111 West Seventh Street, in the City of Los Angeles, California, on the 11th day of June, 1956, at 10:00 o'clock a.m. of that day, to testify in the Matter of Lewis Food Company, et al. and Meat and Provision Drivers, Local Union No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, et al., Cases Nos. 21-CA-20061, 21-CA-2203, 21-CB-708.

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Los Angeles, California, this 4th day of June, 1956.

A-77949.

[Seal] Abe Murdock [37]

Received from the Postmaster the Registered or Insured Article, the number of which appears on the face of this return receipt. 1. Mr. Otto Schubert. 2. Mrs. Margareta Schubert. Date of delivery June 5, 1956. [38]

EXHIBIT S

United States of America
National Labor Relations Board

SUBPENA

To: Walter O. Lisser
13513 Orange Avenue
Hollydale, California

Request therefor having been duly made by E. Don Wilson, Counsel for General Counsel, National Labor Relations Board, whose address is 111 W. Seventh Street, Los Angeles, California,

You are hereby required and directed to appear before a Trial Examiner of the National Labor Relations Board, at Room 704, 111 West Seventh Street, in the City of Los Angeles, California, on the 11th day of June, 1956, at 10:00 o'clock a.m. of that day, to testify in the Matter of Lewis Food Company, et al. and Meat and Provision Drivers, Local Union No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, et al., Cases Nos. 21-CA-2061, 21-CA-2203, 21-CB-708.

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the

undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Los Angeles, California, this 4th day of June, 1956.

[Seal] Abe Murdock [39]

A-77953.

Received from the Postmaster the Registered or Insured Article, the number of which appears on the face of this receipt. 1. Walter O. Lisser. 2. Beverly J. Lisser. Date of delivery. June 6, 1956. [40]

EXHIBIT T

United States of America
National Labor Relations Board

SUBPENA DUCES TECUM

To: Walter Schmidt, Secretary-Treasurer of Association of Independent Workers of America
c/o Lewis Food Company
793 E. 17th Street, Los Angeles 21, California

Request therefor having been duly made by E. Don Wilson, Counsel for General Counsel, National Labor Relations Board, whose address is 111 W. Seventh Street, Los Angeles, California,

You are hereby required and directed to appear before a Trial Examiner of the National Labor Relations Board, at Room 704, 111 West Seventh Street, in the City of Los Angeles, California, on the 11th day of June, 1956, at 10:00 o'clock a.m. of that day, to testify in the Matter of Lewis Food Company, et al. and Meat and Provision Drivers, Local Union No. 626, International Brotherhood of

Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, et al., Cases Nos. 21-CA-2061, et al.

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

1. Minutes of general membership meetings held in 1952, 1953, 1954, 1955 and 1956.

2. Records showing who attended general membership meetings in 1952, 1953, 1954, 1955 and 1956.

3. Voting proxies from members of Association for annual Association meetings in 1952, 1953, 1954, 1955 and 1956.

4. Form or forms of application for membership in Association used in 1952, 1953, 1954, 1955 and 1956.

5. Form of request for deduction of initiation fee and dues for years 1952, 1953, 1954, 1955 and 1956.

6. Records of membership of Association for years 1952, 1953, 1954, 1955 and 1956.

7. Financial statements of Association for 1952, 1953, 1954, 1955 and 1956.

8. Original of Bylaws of Association of Independent Workers adopted on or about February 19, 1956.

9. Original of Constitution of Association of Independent Workers of America adopted on or about February 19, 1956.

10. Original of Constitution of "Association of Food Handlers (formerly Association of Pet Food Manufacturers Employees)," copy of which was

submitted to the National Labor Relations Board on or about February 10, 1955, and allegedly signed on January 24, 1952.

11. Copy of Association receipt to Jose Flores for approximately $5.25, dated on or about July 26, 1954.

12. Copy of Association receipt to DeWitt Chapman, dated on or about March 23, 1955, for approximately $12.75.

13. Copy of Association receipt to John J. Charles, dated on or about March 23, 1955, for approximately $12.75.

14. Applications for membership in the Association and requests for deduction of initiation fees and dues signed by Walter Gorablenkow, DeWitt Chapman, John Charles, James Aitken, Daniel Turk, Ivan Maier and Otto Roth in or about February or March 1955, and application for membership and request for deduction of dues signed by Jose Flores in 1954.

15. All Association records showing the names of the Shop Stewards for the Association during the years 1952, 1953, 1954, 1955 and 1956. [42]

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Los Angeles, California, this 1st day of June, 1956.

[Seal] Abe Murdock [41]

B-28668.

Received from the Postmaster the Registered or Insured Article, the number of which appears on

the face of this return receipt. 1. Walter Schmidt. 2. H. W. Lewis. Date of delivery June 2, 1956. [43]

EXHIBIT U

[Title of Board and Causes.]

PETITION TO REVOKE SUBPOENA DUCES TECUM

To: The National Labor Relations Board:

Now comes D. B. Lewis, purportedly subject to subpoena duces tecum No. B-28669, by his attorneys, Hill, Farrer & Burrill, Ray L. Jolfinson, Jr. and William H. Wilson, appearing specially for the purpose of this petition only and only for the purpose of objecting to the jurisdiction of the Board and confining this appearance solely to the question of the validity of said subpoena and to the question of the jurisdiction of the Board, and petitions the [44] Board to revoke, set aside and quash the alleged or pretended service of the foregoing subpoena, which said subpoena purports to have been signed and issued by "Abe Murdock" at the purported request of E. Don Wilson, counsel for General Counsel, National Labor Relations Board. A copy of said purported subpoena duces tecum is attached hereto and incorporated herein as though fully set forth.

Said petition to revoke subpoena duces tecum is made upon the following grounds:

1. The subpoena duces tecum is void as not having been issued by the Board or a member thereof

in compliance with Section 11 of the Act; and Section 2634.01 of the Regulations authorizing the Regional Director or a hearing officer to issue subpoenas is void as being in excess of, and contrary to, the powers granted to the Board under the Act.

2. No proper application for the same was made under the rules and regulations of the Board in that counsel for the General Counsel requested the Regional Director to issue the subpoena duces tecum and that counsel for the General Counsel is not a "party", authorized to request subpoenas duces tecum either by the Act or the regulations.

3. There is no showing that the evidence whose production is required, relates to any matter in question in the instant proceedings.

4. The entire proposed action complained against constitutes a general, roving, exploratory search or fishing expedition, contrary to the provisions of the Fourth and Fifth Amendments of the United States Constitution.

This petition is supported by, and based upon, the [45] records and files herein and upon this petition.

Dated: June 7th, 1956.

HILL, FARRER & BURRILL
and
WILLIAM H. WILSON
/s/ By RAY L. JOHNSON, JR.
Attorneys for Petitioner [46]

[Subpena Duces Tecum attached is set out as Exhibit K at pages 30-32.]

EXHIBIT V

[Title of Board and Causes.]

PETITION TO REVOKE SUBPOENAS.

To: The National Labor Relations Board:

Now come Henry Mello, purportedly subject to subpoena No. A-77950, Maynard Folden, purportedly subject to subpoena No. A-77954, and Gramemont Banville, purportedly subject to subpoena No. A-77961, by their attorneys, Hill, Farrer & Burrill, Ray L. Johnson, Jr., and William H. Wilson, appearing specially for the purpose of this petition only and only for the purpose of objecting to the jurisdiction of the Board and confining their appearances solely to the question of the validity of said subpoenas and to the question of the [50] jurisdiction of the Board, and petition the Board to revoke, set aside and quash the alleged or pretended service of the foregoing subpoenas, which said subpoenas purport to have been signed and issued by "Abe Murdock" at the purported request of E. Don Wilson, counsel for General Counsel, National Labor Relations Board. A copy of each of said purported subpoenas is attached hereto and incorporated herein as though fully set forth.

Said petition to revoke subpoenas is made upon the following grounds:

1. The subpoenas are void as not having been issued by the Board or a member thereof in compliance with Section 11 of the Act; and Section 203.4.01 of the Regulations authorizing the Regional Director or a hearing officer to issue subpoenas is

void as being in excess of, and contrary to, the powers granted by the Board under the Act.

2. No proper application for the same was made under the rules and regulations of the Board in that counsel for the General Counsel requested the Regional Director to issue the subpoenas and that counsel for the General Counsel is not a "party", authorized to request subpoenas either by the Act or the regulations.

This petition is supported by, and based upon, the records and files herein and upon this petition.

Dated: June 8, 1956.

HILL, FARRER & BURRILL
and
WILLIAM H. WILSON
/s/ By RAY L. JOHNSON, JR.
Attorneys for Petitioner [51]

[Subpoenas attached are set out as follows: Henry Mello as Exhibit L at pages 32-33; Maynard (Mac) Folden as Exhibit M at pages 33-34; Grammont Banville as Exhibit N at pages 34-35.]

EXHIBIT W

[Title of Board and Causes.]

PETITION TO REVOKE SUBPOENA DUCES TECUM

To: The National Labor Relations Board:

Comes now Walter Schmidt, supposedly subject to subpoena duces tecum No. B-28668, by his attorney, Alva C. Baird, appearing specially for the

purpose of this petition only and only for the purpose of objecting to the jurisdiction of the Board and confining this appearance solely to the question of the validity of said subpoena and to the question of the jurisdiction of the Board, and petitions the Board to revoke, set aside and quash the alleged service of the forementioned subpoena, which said subpoena allegedly is signed and issued by [58] "Abe Murdock" at the purported request of E. Don Wilson, counsel for General Counsel, National Labor Relations Board. A copy of said purported subpoena duces tecum is attached hereto and incorporated herein as though fully set forth.

Said petition to revoke subpoena duces tecum is made upon the following grounds:

1. The subpoena duces tecum is void as not having been issued by the Board or a member thereof in compliance with Section 11 of the Act; and Section 102.58 of the Regulations authorizing the Regional Director or a hearing officer to issue subpoenas is void as being in excess of, and contrary to, the powers granted to the Board under the Act.

2. There is no showing or allegation that the evidence whose production is required, relates in any matter whatsoever in question in the instant proceedings.

3. The subpoena duces tecum attached hereto is a general, exploratory search, general in nature and contrary to the provisions of the Fourth and Fifth Amendments of the United States Constitution. Federal Trade Commission v. American Tobacco Company, 264 US 298, 306.

4. That there was no proper application for said subpoena duces tecum under the Rules and Regulations of the Board and that counsel for the General Counsel requested the Regional Director to issue said subpoena duces tecum and that counsel for the General Counsel is not a "party", authorized to request subpoenas duces tecum either by the Act or the Regulations. N.L.R.B. v. Pesante, 119 F. Supp. 444.

This petition is supported by and based upon, the records and files herein, this petition, and the cited Act, Regulations and points and authorities.

Dated: June 8, 1956.

LAW OFFICES, ALVA C. BAIRD
/s/ By G. A. SHEPPARD
Attorneys for the Association

[Subpena attached, Walter Schmidt, is set out as Exhibit T at pages 41-44.]

EXHIBIT X

[Title of Board and Causes.]

PETITION TO REVOKE SUBPOENAS

To: The National Labor Relations Board:

Come now Joe Loera, Anastacio Holquin, William L. (Roy) Miller, Otto Schubert and Walter O. Lisser, all supposedly subject to subpoena Nos. A-77955, A-77952, A-77951, A-77949 and A-77953 respectively, by their attorney, Alva C. Baird, appearing specially for the purpose of this petition only and only for the purpose of objecting to the

jurisdiction of the Board and confining this appearance solely to the question of the validity of said subpoenas and to the question of the jurisdiction [63] of the Board, and petition the Board to revoke, set aside and quash the alleged service of the aforementioned subpoenas, which said subpoenas allegedly are signed and issued by "Abe Murdock" at the purported request of E. Don Wilson, counsel for General Counsel, National Labor Relations Board. Copies of said purported subpoenas are attached hereto and incorporated herein as though fully set forth.

Said petition to revoke subpoenas is made upon the following grounds:

1. The subpoenas and each and every one of them, are void as not having been issued by the Board or a member thereof in compliance with Section 11 of the Act; and Section 102.58 of the Regulations authorizing the Regional Director or a hearing officer to issue subpoenas is void as being in excess of, and contrary to, the powers granted to the Board under the Act.

2. That there was no proper application for said subpoenas, or any one of them, under the Rules and Regulations of the Board, and that counsel for the General Counsel requested the Regional Director to issue said subpoenas and that counsel for the General Counsel is not a "party", authorized to request subpoenas either by the Act or the Regulations. N.L.R.B. v. Pesante, 119 F. Supp. 444.

This petition is supported by and based upon,

the records and files herein, this petition, and the cited Act, Regulations and points and authorities.

Dated: June 8, 1956.

LAW OFFICES, ALVA C. BAIRD
/s/ By G. A. SHEPPARD
Attorneys for the Association

[Subpenas attached are set out as follows: Joe Loera as Exhibit O at pages 35-36; Anastacio Holquin as Exhibit P at pages 36-37; William L. (Roy) Miller as Exhibit Q at pages 38-39; Otto Schubert as Exhibit R at pages 39-40; Walter O. Lisser as Exhibit S at pages 40-41.]

EXHIBIT Y

[Title of Board and Causes.]

ORDER

Petitions to Revoke Subpenas having been filed with the undersigned on June 11, 1956, by Henry Mello, Maynard Folden, Grammont Banvill and D. B. Lewis,

It is hereby ordered that the same be and it hereby is referred to the Trial Examiner conducting this consolidated hearing, National Labor Relations Board, for a ruling.

Dated at Los Angeles, California, this 11th day of June, 1956.

[Seal] /s/ HENRY W. BECKER
Regional Director, National Labor Relations Board,
Twenty-First Region. [75]

EXHIBIT Z

[Title of Board and Causes.]

ORDER

Petitions to Revoke Subpoenas having been filed with the undersigned on June 11, 1956, by Joe Loera, Anastacio Holquin, William L. (Roy) Miller, Otto Schubert, Walter O. Lisser and Walter Schmidt,

It is hereby ordered that the same be and they are hereby referred to the Trial Examiner conducting this consolidated hearing, National Labor Relations Board, for a ruling.

Dated at Los Angeles, California, this 11th day of June 1956.

[Seal] /s/ HENRY W. BECKER
Regional Director, National Labor Relations Board,
Twenty-First Region. [76]

EXHIBIT AA

AN EXCERPT FROM TRANSCRIPT OF HEARING IN CASES NUMBERS 21-CA-2061, 21-CA-2203 AND 21-CB-708 BEFORE TRIAL EXAMINER WALLACE ROYSTER OF SAN FRANCISCO, CALIFORNIA

Proceedings on June 11, 1956

Mr. E. Wilson: Sir, may I have marked for identification as General Counsel's exhibit 1-PP a letter dated June 8, 1956, addressed to the National

Labor Relations Board, attention of Mr. Henry Becker, Regional Director, enclosing a so-called new petition to revoke subpoenas in the case of Henry Mello, Maynard Folden, and Grammont Banville, in which counsel states that through inadvertence, the first petition prepared and served referred to subpoenas duces tecum rather than to subpoenas, and pointing out that that mistake or inadvertence had been corrected in the petition.

Attached to that letter, if this will meet the convenience of the parties and the Trial Examiner, and forming a part of this exhibit—if it does not meet the convenience of the parties, I can make these separate—is a petition to revoke subpoenas filed by Ray L. Johnson, Jr. for Hill, Farrer & Burrill and William H. Wilson, dated June 8, 1956, apparently in behalf of Henry Mello, Maynard Folden, and Grammont Banville.

Further attached is a petition to revoke subpoenas duces tecum filed by Ray L. Johnson, Jr. for Hill, Farrer & Burrill and William H. Wilson. This petition being filed on behalf of D. B. Lewis.

There is further attached a petition to revoke subpoenas duces tecum filed by Ray L. Johnson, Jr. on behalf of Hill, Farrer & Burrill and William H. Wilson on behalf of Henry Mello, Maynard Folden, and Grammont Banville, being my understanding that this is the particular petition that counsel states was filed through inadvertence.

(The document referred to was marked as General Counsel exhibit 1-PP for identification.)

Mr. E. Wilson: As General Counsel's exhibit 1-QQ for identification, an order of Regional Director Henry W. Becker, dated June 11, 1956, referring to this Trial Examiner the petitions to revoke subpoenas which have been referred to as being a part of General Counsel's exhibit 1-PP for identification. [77]

(The document referred to was marked as General Counsel exhibit 1-QQ for identification.)

Mr. E. Wilson: I now offer General Counsel's exhibit 1-PP for identification and 1-QQ for identification in evidence.

Mr. Johnson: No objection.

Mr. Sheppard: I have no objection.

Trial Examiner: The exhibits are received.

(The documents heretofore marked as General Counsel's exhibits 1-QQ and 1-PP were received in evidence.)

Mr. Hackler: A question of information. Do I understand the practice still to be the disposition of the motion is done ex party on the record?

Trial Examiner: They certainly may be done ex party, and I suppose that is the usual fashion. They may become a part of the record upon the motion of any party.

Mr. Johnson: I so move.

Trial Examiner: We will have it on the record.

Mr. E. Wilson: Of course, Mr. Trial Examiner, I am not suggesting that arguments with respect to these petitions must be on the record. I don't

care which way. I believe that those last two exhibits have been received.

Trial Examiner: Yes, they have. Is there any particular point or ruling on them at this moment? Would it serve the purposes of the parties in any respect to rule on them immediately?

Mr. E. Wilson: Yes. If I may point out to the Trial Examiner, on June 7, 1956, I wrote a letter to Mr. Johnson stating that I had caused subpoenas to be served on various employees of Lewis Food Company, many of which were returnable as the same day and hour, that being this morning, June 11th at 10 o'clock, pointing out that obviously that all of them couldn't testify. That it wasn't my desire to cause so many of the Company's personnel to be away from the plant simultaneously and suggesting that arrangements be made for those who had been subpoenaed to appear at such time as the testimony was to be taken. [78]

I advised Mr. Johnson in this letter that it was my intention to call Mr. D. B. Lewis and Mr. Schmidt as my first witnesses, and that I should endeavor to call the others in such an order as not seriously to inconvenience Lewis Food Company.

I expressed the opinion that Mr. Johnson's cooperation would be very helpful.

I now call Mr. D. B. Lewis as my first witness.

I look around and see that Mr. D. B. Lewis is not here. That is a petition to revoke his subpoena. I would like to have that ruled on, sir.

Trial Examiner: We will be off the record while I look over the subpoenas and the motions.

Mr. Johnson: I have prepared points and authorities, Mr. Royster.

Trial Examiner: I will ask you for them, then.

Mr. Johnson: I don't know whether you want them on the record.

Trial Examiner: Let's have it right now.

Mr. E. Wilson: I assure you I am not arguing the matter at this time since I know you have not observed the subpoenas, but so that you will know some of the matter that at least I shall address myself to.

One will be timeliness of the petition. I believe that more than five days had passed since service of the subpoena duces tecum upon D. B. Lewis. Service was effected on June 2, 1956. The petition to revoke was not received until today.

Mr. Johnson: It was mailed Friday, Mr. Trial Examiner, and in the ordinary course of the mail from five blocks, it should have been received on Saturday, which was timely enough.

Mr. E. Wilson: I simply call that to your attention, sir, as something I shall expect to argue.

Mr. Sheppard: Mr. Trial Examiner, may I check outside the office to see if these petitions are filed.

Trial Examiner: We shall be off the record now.

Mr. Johnson: Any issue about the mailing, I will call my secretary over here to testify. [79]

Mr. E. Wilson: I will not dispute that they were mailed sometime on Friday.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

I have read the petition to revoke subpoenas, the memorandum of points and authorities in support thereof, and the decision of Judge Paul in the Federal District Court down here, which bears on the point.

Mr. Johnson: Mr. Trial Examiner, I don't mean to interrupt but I want, before you make a ruling, to protect myself, and I want to object to, as you probably noticed, your jurisdiction to rule on our petition to revoke.

Mr. Sheppard: Same objection from the Association.

Trial Examiner: Very well. I have also, of course, referred to the Rules and Regulations of the National Labor Relations Board, and until the Rules and Regulations of the National Labor Relations Board are changed, why, of course, I propose to follow them.

The memorandum and the petition points out what I believe to be a fact, that nowhere in the definition of a party is the term or the designation "General Counsel" set forth.

I recognize, however, that the General Counsel has been traditionally in these hearings been given the status of a party. He is, in my opinion, one who fulfills all the criteria, satisfies all of the criteria that might be applied to a situation where one is trying to determine who is a party, and I will rule that he is a party.

Following the Rules and Regulations, with a bow to Mr. Johnson and the very cogent arguments

that he has presented, no matter how persuasive I may find them, I will still follow the Rules and Regulations.

I deny the motion to quash as to the subpoenas ad testificandum.

As to the one addressed to Mr. Lewis towards the production of documents, I want a little further information. I suppose that at a minimum, the first thing I should do is examine the complaint which I have not yet done, and if no apparent connection between the request to produce contained in the [80] subpoena duces tecum, between that request and the complaint is there, then I shall ask for an explanation as to the relevancy between what is requested to be produced and the allegations in the complaint.

Mr. E. Wilson: Mr. Trial Examiner, it may well be, if you were to follow my thinking in connection with this petition to revoke on behalf of D. B. Lewis, that it would not even be necessary for you to reach the question of relevancy in view of the fact that it is my position that the petition is untimely, the petition to revoke.

Trial Examiner: When do you say the subpoena was served?

Mr. E. Wilson: The subpoena was served, and I have here the subpoena or copy, together with the post office return receipt. The post office return receipt shows the date of delivery as June 2, 1956.

I point out, of course, that this is June 11th. That it was received today, nine days after service.

I point out that Section 102.31 of the Rules pro-

vides that any person subpoened, if he does not intend to comply with the subpoena, shall, within five days after the date of service of the subpoena upon him, petition in writing to revoke the subpoena. All petitions to revoke subpoena shall be served on the party at whose request the subpoena was issued. Such petition to revoke, if made prior to the hearing, shall be filed with the Regional Director,—mentally and am attempting verbally to underscore "filed with the Regional Director"—and the Regional Director shall refer the petition to the Trial Examiner of the Board for ruling.

It also continues "that petitions to revoke subpoenas filed during the hearing shall be filed with the Trial Examiner."

We are not talking about putting something into the mail. We are talking about filing. The petition to revoke a subpoena should be filed, that is, be served and be here either with the Regional Director or with the Trial Examiner if the case has begun hearing, within five days after the date of service, without regard to any question of intervening Saturdays or Sundays. More than five days elapsed from the date of service of the subpoena before the subpoena was filed. [81]

Trial Examiner: The date of service was on a Saturday.

Mr. E. Wilson: On a Saturday, yes, sir.

Trial Examiner: When was the petition received to revoke?

Mr. E. Wilson: This morning.

Mr. Sheppard: Mr. Trial Examiner, might I interject a moment here. I note what I mentioned before, that the petition for revoking have come in the mail, so when you are reviewing, you will be reviewing the same, but if you do have the copy of the new Rules and Regulations, I think 192.81, 82, and 83 answers that argument exactly on the head, according to the wordage there.

You don't count Sundays when you have a limit less than seven days. I think that will be an answer to that.

Mr. E. Wilson: Let's eliminate the Sundays, if you wish. I am talking now for the purpose of arguing. I am not conceding that the Rules so require. I am saying that service effectuated before Monday—which would have been the 4th—the 4th, 5th, 6th, 7th—the 8th was Friday. No later than the 8th; under any circumstances, this petition to revoke should have been filed with the Regional Director. It was not filed with the Regional Director. It is untimely.

Trial Examiner: I am not sure that I go along with you on that. It is true that the subpoena was received on a Saturday. Whether received by Mr. Lewis personally on that date, I don't know. Does your card show?

Mr. E. Wilson: It shows that it was received or signed for. There is the name, the addressee, printed, D. B. Lewis; on the second line, the addressee's agent, H. W. Lewis.

I think it may well be stipulated here for the

purposes of this record at this time that Mr. H. W. Lewis is an officer of Lewis Food Company.

Mr. W. Wilson: So far as I know, he is not.

Trial Examiner: In any event, it was received at his business address.

Mr. E. Wilson: Yes, by his brother.

Mr. Johnson: May I refer the Trial Examiner to Section 102.83 of the Rules, which adds three days to a period in which to do things if a notice was served by mail. [82]

Mr. Sheppard: And excludes Sundays.

Mr. Johnson: And excludes Sundays, and today is only the eighth day.

Trial Examiner: I don't see how you can say that the day of service was earlier than June the 4th.

Mr. E. Wilson: I say it was earlier than that because of the fact that it was received on June 2nd.

Trial Examiner: Yes. It was received on a Saturday, but Rule 102.83 says that for the purpose of this section, a Saturday on which the Board's offices are not open for business shall be considered as a holiday.

Now then, if you assume that the service was effective on the 4th, the day of service is not counted. The fifth day would not be until today, until the expiration of it.

I will rule that the petition to revoke has been filed timely.

Do I have a copy of the complaint in this file?

Mr. E. Wilson: Yes, sir. May I locate it for you. I realize you have a great many papers.

May I point out, sir, that you may desire to look at the bill of particulars which was furnished in connection with the complaint as well.

Trial Examiner: All right.

Mr. E. Wilson: At such time as you want to, I will locate that for you.

Trial Examiner: Let's start with number 1 on attachment B to the subpoena duces tecum, served on Mr. Lewis. How does that relate to the complaint, Mr. Wilson?

Mr. E. Wilson: As the Trial Examiner is now aware, there is a charge of violation of section 8A2 by this employer. There are a number of "employees" that General Counsel considers to be supervisors who are officers or active in behalf of the Association. Evidence of supervisory authority would be termination of employees on the recommendation of such people. That is what 1, 2, and 3 relate to. General Counsel believes that the termination notices will contain the names of certain people as recommending—having recommended discharges which were effectuated. [83]

General Counsel will then go on to prove that such people were either officers of this allegedly dominated Association or were active in behalf of the Association, so that would account for 1, 2, and 3.

Trial Examiner: As to 4, I believe you have alleged that Mr. Chapman, Charles and Roth, that deductions from pay were made for dues to the Association before the expiration of any thirty day period.

Mr. E. Wilson: That is correct, sir.

Trial Examiner: What about the others you have named in there?

Mr. E. Wilson: General Counsel has reason to believe that the same is true of the others, and believes that the records which have been particularized there will show that to be the fact.

Trial Examiner: Have you at any time in the complaint or any bill of particulars set forth that it was by such conduct in respect to Gorablenkow, Turk, Aitken, and Maier, that a violation of Section 8A2 was accomplished?

Mr. E. Wilson: I have not particularized the complaint to include those names. I have stated, however, in the complaint that the employer has interfered with, assisted illegally, dominated in the Association. This would be evidence if, in fact, the Employer did deduct such dues, initiation fees, prior to the 30 days, that would be evidence of that assistance, domination.

Trial Examiner: In paragraph 5, you repeat those seven names, and add that of Jose Flores as to applications for employment. What aspect of the complaint do you consider will be supported?

Mr. E. Wilson: Again, the 8A2 allegations will be supported by these. I don't feel, sire, that I am being called upon to spell out in detail, as it may make an offer of proof of all I expect to prove.

I can in general state that there will be evidence. I will expect that there will be evidence, with respect to Jose Flores just as with those other named persons. That within less than thirty days after

they were employed, they were required to pay initiation fees and dues.

Trial Examiner: But this requires more than the evidence showing the date of employment. This is the application for employment presumably made by these individuals. [84]

Mr. E. Wilson: The applications for employment I have reason to believe will also have marked on there the date that they commenced employment. In any event, if the deductions were made in fact within even less than thirty days after they applied for work, let alone went to work, I think it should be obvious what the results were.

Trial Examiner: Is any more than four, except for the addition of the name, Jose Flores?

Mr. E. Wilson: You will have to let me have a moment, sir. I know I had something in mind, of course, when I made the distinction between those.

Mr. Johnson: Maybe I can help you.

It is your position, I take it, that in one case, it is an application for employment. That may not be the same thing, the same time that they began working.

Mr. E. Wilson: Exactly. That is true.

Trial Examiner: But the day they went to work is the date that interests you, isn't that so?

Mr. E. Wilson: It could well be that the day of application for employment—for example, sir, supposing that the evidence—and I believe the evidence will be forthcoming—that indeed before employees actually started working, they were re-

quired to sign applications for membership in the union, and to sign check-off cards for initiation fees and dues deduction.

Trial Examiner: That is what you expect out of paragraph 5.

Mr. E. Wilson: Yes. I expect to have those dates established.

Trial Examiner: Is 6 different in any respect from 1, 2, 3 for any purpose?

Mr. E. Wilson: No, sir.

Trial Examiner: All right. Do you have anything further to say before I rule on this duces tecum.

Mr. Johnson: Yes, Mr. Trial Examiner.

In connection with 4 and 5, those persons other than Chapman, Charles and Roth, we ask for a Bill of Particulars in connection with paragraphs 9 and 10 on conclusions of law that we dominated, assisted, and controlled the union, [85] and in connection with the Bill of Particulars which the Trial Examiner ruled on, counsel only gave us the additional names of Chapman and Charles, and I say therefore, in view of the fact that we have had a Bill of Particulars, it cannot now come in and support these other individuals on the basis of a shot gun allegation that we have dominated, controlled, assisted the Association.

Since there has been no specification of those individuals by name in the Bill of Particulars, we submit that their dates of employment and the dates of when their dues and initiation fees were deducted is outside the issues framed.

Mr. E. Wilson: I submit, of course, sir, that those events with respect to those particular individuals would merely be evidence of the general pattern of active participation by management through its officers and agents in directing, management controlling the affairs, activities, and policies of the Association.

It may well be, Mr. Trial Examiner, that the evidence, when it is developed here, will show that a plant with anywhere from 150 to 200 employees regularly employed, with a tremendous turnover, that hundreds of employees have, in fact, been required to sign applications for union membership and dues deduction and, in fact, have been caused to make such payments earlier than thirty days after their employment against their will.

This not a matter of alleging each one of those tickets is a separate violation, but that is part of the activity of the employer which has been alleged by counsel for General Counsel satisfactorily to Trial Examiner Herman Marx, and bring to your attention at this time, sir, the fact that I will endeavor to make it a part of the record that we received this morning at 11:30 a.m. a teletype from the Executive Secretary of the Board that the Respondent Employer's request for special permission to appeal to the Board from Trial Examiner Marx' ruling on the second motion was hereby denied.

Trial Examiner: In compliance with the ruling of Trial Examiner Marx, you supplied the names of DeWitt Chapman and John Charles, is that cor-

rect, as persons who were required to pay dues before the thirty day period had expired. [86]

Mr. E. Wilson: On the ruling of Trial Examiner Marx, sir, he did not order me to supply the names of anybody who was discriminated against in such fashion. Trial Examiner Herman Marx directed me to supply in terms of ultimate fact the manner in which the Employer dominated, interfered with, and, so forth, the Association. That is what I did in my Bill of Particulars.

When I gave those names, what I was particularly doing was pointing out particular instances of discrimination, whether it would be under 8A2 or not.

I am not going to resist this to this extent, sir. So long as it is understood that I am not thereby limiting myself, to the extent that I am now able, I will supply the names that have just been called for and state that they were discriminated against in the same fashion during the years 1954 and 1955. I do not thereby intend to limit myself to developing throughout the course of this trial the fact that others may well have been discriminated against.

Trial Examiner: Whose names you do not now have.

Mr. E. Wilson: I do not at this time, no, sir.

Trial Examiner: All right. Is your Bill of Particulars then expanded to include the names of individuals other than those already given in the Bill of Particulars or in the complaint, the names appearing in paragraphs 4 and 5 of the attachment?

Mr. E. Wilson: May I look at it, sir.

Mr. Johnson: I can state for the record, as far as I am concerned, from the 18th until the 15th of July, any date is all right with me.

Trial Examiner: All right. I hear no objection to the continuance, and the hearing is continued, and the circumstances as set by the motion.

(Whereupon, at 2:08 p.m. the hearing in this matter was continued indefinitely.) [95]

Duly Verified.

[Endorsed]: Filed June 29, 1956. [96]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

The National Labor Relations Board, hereinafter called the Board, by its General Counsel and by Daniel J. Harrington, its Chief Law Officer for the Twenty-First Region, having filed its application for an order requiring Respondents D. B. Lewis, President, Lewis Food Company; Henry Mello; Maynard (Mac) Folden; Grammont Banville; Joe Locra; Anastacio Holquin; William L. (Roy) Miller; Otto Schubert; Walter O. Lisser; and Walter Schmidt, Secretary-Treasurer of Association of Independent Workers of America, to obey and comply with certain subpoenas ad testificandum and duces tecum duly and properly served upon said Respondents as set forth in said application and good cause appearing therefor, it is hereby

Ordered that Respondents D. B. Lewis, President, Lewis Food [97] Company; Henry Mello;

Maynard (Mac) Folden; Grammont Banville; Joe Loera; Anastacio Holquin; William L. (Roy) Miller; Otto Schubert; Walter O. Lisser; and Walter Schmidt, Secretary-Treasurer of Association of Independent Workers of America, appear and show cause, if any there be, before this Court at Los Angeles, California, on the 9th day of July, 1956, at two o'clock in the afternoon of that day as soon thereafter as counsel can be heard why an order of this Court should not issue directing Respondents Henry Mello, Maynard (Mac) Folden, Grammont Banville, Joe Loera, Anastacio Holquin, William L. (Roy) Miller, Otto Schubert and Walter O. Lisser to appear before Wallace Royster, the Trial Examiner designated by the Board in Cases Nos. 21-CA-2061, 21-CA-2203 and 21-CB-708, pending before said Board, at such time and place as said Trial Examiner may designate and there give testimony and answer any and all questions which may be propounded to them in connection with the matters under investigation and in question in said proceedings before the Board, and further directing that Respondents D. B. Lewis, President of Lewis Food Company, and Walter Schmidt, Secretary-Treasurer of Association of Independent Workers of America, appear before Wallace Royster, the Trial Examiner designated by the Board in Cases Nos. 21-CA-2061, 21-CA-2203 and 21-CB-708, pending before said Board, at such time and place as said Trial Examiner may designate and there and then testify and answer any and all questions which may be propounded to them in connection with the

proceedings before the Board and, in addition, to then and there produce the books, papers, records and documents described in the subpoenas duces tecum served upon them, and further directing that the costs of this proceeding be taxed and adjudged against Respondents, together with such other sum as will reasonably compensate the National Labor Relations Board as an agency of the United States Government for the expenses and costs actually incurred in connection with the prosecution of this proceeding to compel obedience to subpoenas of the National Labor Relations Board, and [98]

It Is Further Ordered that service of this order, together with a copy of the application on which it is issued, be made by a United States Marshal upon Respondents D. R. Lewis, President, Lewis Food Company; Henry Mello; Maynard (Mae) Folden; Grammont Banville; Joe Loera; Anastacio Holquin; William L. (Roy) Miller; Otto Schubert; Walter O. Lisser; and Walter Schmidt, Secretary-Treasurer of Association of Independent Workers of America, in any manner provided in the Rules of Civil Procedure for the District Courts of the United States, or by registered mail, and that proof of service be filed herein by the United States Marshal.

Issued at Los Angeles, California, this 29th day of June, 1956, at 12 m.

/s/ PAUL J. McCORMICK,
United States District Judge.

Presented by Daniel J. Harrington, Chief Law Officer, E. Don Wilson, Attorney. [99].

[Endorsed]: Filed June 29, 1956.

In the United States District Court, Southern District of California, Central Division

Civil No. 20119-TC

NATIONAL LABOR RELATIONS BOARD,
Applicant,

v.

D. B. LEWIS, PRESIDENT, LEWIS FOOD COMPANY; HENRY MELLO; MAYNARD (MAC) FOLDEN; GRAMMONT BANVILLE; JOE LOERA; ANASTACIO HOLQUIN; WILLIAM L. (ROY) MILLER; OTTO SCHUBERT; WALTER O. LISSER; AND WALTER SCHMIDT, SECRETARY-TREASURER OF ASSOCIATION OF INDEPENDENT WORKERS OF AMERICA,
Respondents.

ORDER

The above-entitled cause came on for hearing on the 9th day of July 1956, before Honorable United States District Judge Thurmond Clarke, upon the application of the National Labor Relations Board for an order requiring the Respondents to obey certain subpenas served upon the Respondents.

The cause was argued and points and authorities were submitted. The Court, having considered the evidence and being fully advised in the premises, has heretofore, on July 16, 1956, filed a minute order, denying the Applicant's request for an Order requiring obedience to subpenas.

Now, Therefore, It Is Ordered, Adjudged and Decreed that the Order [100] requested by Applicant, requiring obedience to subpenas by the Respondents, is denied. See National Labor Relations vs. Pesante, 119 F. Supp. 444.

Dated: July 30, 1956.

/s/ THURMOND CLARKE,
United States District Judge [101]

[Endorsed]: Lodged July 24, 1956. Filed July 30, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the National Labor Relations Board, appellant in the above case, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of this Court entered on July 30, 1956, refusing to enforce subpenas in the above-captioned proceeding.

Dated at Washington, D. C., this 16th day of August, 1956.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel, National Labor Relations Board [102]

[Endorsed]: Filed Aug. 20, 1956.

Trial Examiner: To the subpoena duces tecum.

Mr. E. Wilson: Yes, sir.

Trial Examiner: Very well. Anything further, Mr. Johnson?

Mr. Johnson: No, I don't believe so, Mr. Examiner. At least in this connection.

Trial Examiner: I will deny the motion.

Mr. E. Wilson: Mr. Trial Examiner, I am marking as General Counsel's Exhibit 1-RR for identification a teletype from the Executive Secretary of the Board to Regional Director Becker stating that Respondent Employer's request for special permission to appeal to the Board on the second motion of Bill of Particulars is denied. [87]

(The document referred to was marked as General Counsel's Exhibit 1-RR for identification.)

Mr. E. Wilson: I offer General Counsel's Exhibit 1-RR for identification in evidence.

Mr. Johnson: I will make the objection that we haven't been served with such notice.

Trial Examiner: All right. I will overrule the objection, and if, before the end of the hearing, you don't have a copy of that, I will reconsider that.

The document is received.

(The document heretofore marked as General Counsel's Exhibit 1-RR for identification was received in evidence.)

Trial Examiner: It is a few minutes after 12. What is your situation?

Mr. E. Wilson: First, I think I should like to

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 104, inclusive, contain the original

Application for Order Requiring Obedience to Subpenas Ad Testificandum and Duces Tecum;

Order to Show Cause;

Order;

Notice of Appeal;

Designation of Contents of Record on Appeal; all in the above-entitled case and constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit in the above case.

I further certify that my fees for preparing the foregoing record amount to $2.00, which sum has not been paid by appellant.

Witness my hand and seal of the said District Court this 28th day of September, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk,
/s/ By CHARLES E. JONES,
Deputy

have, for the purposes of the record, something else introduced into evidence.

(The document referred to was marked as General Counsel's Exhibit 1-SS for identification.)

Mr. E. Wilson: I have had marked for identification as General Counsel's exhibit 1-SS, a copy of a letter written by me to Mr. Johnson on June 7, 1956, to which reference previously was made in a statement.

I offer General Counsel's Exhibit 1-SS in evidence.

Mr. Johnson: I object on the ground of materiality.

Trial Examiner: Since no contention is made that the subpoena is unduly oppressive in its requirement that certain individuals be here at a stated hour, I will reject the offer.

(The document heretofore marked as General Counsel's Exhibit 1-SS for identification was rejected.)

Mr. E. Wilson: May I point out, Mr. Trial Examiner, and I intend to make an inquiry of Mr. Johnson. I subpoenaed a Mr. Schubert, who is an employee of Lewis Food Company, to be here this morning at 10 o'clock. The same for Mr. Mello, Mr. Miller, Mr. Holguin, Mr. Lisser, Mr. Folden, Mr. Loera, as well as Mr. Schmidt and Mr. D. B. Lewis.

As the Trial Examiner can see, although you might not be able to tell, the fact is that none of those witnesses appeared.

May I inquire of you, Mr. Johnson, whether, pursuant to my letter or [88] otherwise, which has now been directed, you directed any of those gentlemen not to appear?

Mr. Johnson: I directed them not to. Strike that.

I directed Mr. Mello, Mr. Folden, Mr. Banville, and Mr. D. B. Lewis, whom I represent, not to be here on the ground that the subpoena and subpoena duces tecum were void, and on behalf of those people, I declined, with all due respect to the Examiner's ruling, I declined to produce these named individuals. Mr. Sheppard represents the others.

Mr. Sheppard: That is correct, Mr. Wilson. The petition that came in in the intermission that we were discussing earlier cites the names of the remaining people Mr. Johnson mentioned that I represent, and I also advised them not to appear at that time on the ground set forth in the petition to revoke the subpoena and the petition to revoke the petition duces tecum.

Mr. E. Wilson: I understand, Mr. Sheppard, that a petition has been received from you or from your office, and no doubt it will be referred to the Trial Examiner.

With respect to those persons whom I have named, other than those that Mr. Johnson named, have you in fact directed them not to appear?

Mr. Sheppard: I will read the names. Mr. Schubert, Mr. Lisser, Mr. Holguin, Mr. Miller, Mr. Loera, and Mr. Walter Schmidt.

Mr. E. Wilson: I withdraw that. I expect that

the Regional Director will be referring the Association's petition to revoke to you. It may be that it is ready at this instant to be brought in here. May I suggest that we take a very short recess so that I can find out what the disposition of it is.

Trial Examiner: We will take a short recess.

(A short recess was taken.)

Trial Examiner: On the record.

Mr. E. Wilson: May I have marked, sir, as General Counsel's Exhibit 1-TT for identification an order of Regional Director Becker referring to you, sir, as Trial Examiner, for ruling—for Board ruling for petition to revoke the subpoena filed by the law offices of Alva C. Baird by G. A. Sheppard on behalf of Joe Loera, Anastacio Holguin, William L. (Roy) Miller, Otto Schubert, Walter O. Lisser and Walter Schmidt, attached to which order are copies of the petition to revoke subpoenas referred to. [89]

(The document referred to was marked as General Counsel's Exhibit 1-TT for identification.)

Mr. E. Wilson: I offer General Counsel's Exhibit 1-TT for identification in evidence.

Trial Examiner: Hearing no objection, General Counsel's Exhibit 1-TT is received.

(The document heretofore marked as General Counsel's Exhibit 1-TT for identification was received in evidence.)

Trial Examiner: General Counsel's 1-TT also includes a subpoena duces tecum apparently served on Walter Schmidt, Secretary-Treasurer of the As-

sociation requiring the production of certain documents. The petition is to revoke subpoenas ad testificandum as to four individuals, and a petition to revoke the petition, subpoena duces tecum, as to Schmidt.

As to the petition to revoke, the subpoenas ad testificandum were laid upon the same ground as I have already ruled upon, that is, that there is no authority in the Regional Director or any one not a member of the Board to issue such subpoenas. That the service is bad or that actually, the issuance is a nullity. That the General Counsel is not a party. It is my opinion that under the rulings of the Board, and particularly under the Rules and Regulations, that neither position can be supported before the Board.

The petition to revoke the subpoenas and testificandum, addressed to Loera, Holguin, Miller, Schubert, and Lisser is denied. Earlier, I said four ad testificandum petitions. Apparently there are five.

As to the subpoena duces tecum addressed to Walter Schmidt—We will be off the record while I read this a little more carefully.

(Discussion off the record.)

Trial Examiner: Mr. Sheppard, I have already ruled against you on two of the grounds on which you rely in respect to the Schmidt subpoena. The listing, A, of the documents, which the General Counsel seeks to have Mr. Schmidt produce in my opinion indicate upon their face a relevancy to the matters complained of.

Is there anything further that you care to say at this point in connection with that?

Mr. Sheppard: I think the petition sets forth my position.

Trial Examiner: The petition to quash is denied.

Mr. E. Wilson: I understand, Mr. Sheppard, that the persons that you have named in this petition to revoke, you have advised them not to appear at this hearing on the ground that the subpoena is void.

Mr. Sheppard: I have so stated.

Mr. E. Wilson: I have some people subpoened for tomorrow, one of whom, for example, is Grammont Banville. I wonder if either you, Mr. Sheppard, or you, Mr. Johnson, or Mr. Wilson, will advise me whether it is the intention of one or the other or you or all of you to advise Mr. Banville in the same fashion as you have already advised these witnesses who have been subpoened for today.

Mr. Johnson: I have so advised Mr. Banville.

Mr. E. Wilson: Is it your intention to file a petition to revoke the petition—the subpoena served on him?

Mr. Johnson: I have filed one already.

Mr. E. Wilson: I didn't realize that Banville was one of them.

Mr. E. Wilson: Mr. Trial Examiner, I had intended to, as I think that letter in evidence—or rather rejected—shows, to call Mr. D. B. Lewis and Mr. Walter Schmidt, as my first witnesses, and then proceed with those others who were subpoened for today.

I do have some other witnesses that I have subpoened for tomorrow and Wednesday, but frankly, this matter of petition to revoke has taken me completely by surprise. I did not expect it.

I think that at 12:30, a luncheon recess would be in order, and at the close of that recess or when we next get going, I can let you know what my intentions are. Whether to continue with what I have got and seek enforcement of those subpoenas, or to ask for a continuance pending enforcement of those subpoenas. At the moment, I don't know just which I intend to do.

Trial Examiner: That will be satisfactory with me.

You haven't asked counsel, at least in my hearing, whether in view of the fact that the petitions to quash have been denied, whether they still will advise the persons concerned in the same fashion.

Mr. E. Wilson: I do ask counsel, if I may speak to you. Mr. Sheppard. The Trial Examiner has ruled on your petition to revoke. Has denied your [91] petition. Will the witnesses, on whose behalf you appeared and made your petition, appear here this afternoon and tomorrow to testify?

Mr. Sheppard: My advice to them will be no, on the grounds that it is jurisdictional, and on the other points and authorities raised throughout both petitions, subpoenas duces tecum, and——

Mr. E. Wilson: May I inquire of you, Mr. Johnson. What is your position with respect to Mr. Schmidt and the other persons on whose behalf you appear.

Mr. Johnson: I don't represent Mr. Schmidt.

Mr. E. Wilson: I am sorry. Mr. Lewis.

Mr. Johnson: On behalf of the people I represent, with all due deference to the Trial Examiner's ruling, and I understand that he must follow the Board's Rules and Regulations until something is shown to the contrary, I will instruct the people that I have appeared for not to appear in this proceeding.

Trial Examiner: Is 2 o'clock a suitable hour for all of you?

We will recess until 2.

Mr. W. Wilson: May I ask the Hearing Officer a question. The hearing is listed to last five days. The reason I ask this is because I have a criminal case set for Monday morning in Inglewood. If this should continue over, I wonder if I may be excused, as long as Mr. Johnson is present.

Mr. Johnson: I want to point out that I have an arbitration scheduled for tomorrow, and either now or at 2 o'clock, I ask that the matter be continued on the ground that I am special labor counsel in this proceeding.

Trial Examiner: We can answer that better at 2 o'clock.

(Whereupon, at 12:33 p.m., the hearing recessed for lunch until 2 p.m. that same day.)

Afternoon Session—2 P.M.

Trial Examiner: On the record.

Mr. E. Wilson: Mr. Trial Examiner, during the noon recess, I considered the situation in which I

find myself because of the failure of witnesses to appear. I find that it is necessary, for proper presentation of my evidence, [92] to have the appearance of those witnesses that I have subpoened, petitions to revoke said subpoenas having been denied by you.

I am going to ask for a continuance of an indefinite time, pending petitions to have the subpoenas enforced by the United States District Court.

I may say that I expect that they shall be enforced, and if enforced; I should then like to have the hearing continued upon three days notice from the Trial Examiner. That is, resumed upon three days notice from the Trial Examiner.

Mr. Sheppard: Did I understand three days from the enforcement order, if there were one.

Mr. E. Wilson: Three days notice from the Trial Examiner.

Trial Examiner: I assume there is no objection to the continuance. Your request, of course, will be made, I suppose, of the Court that in the event that the petition is enforced, that the subpoenas are enforced, that it be referred back to the Trial Examiner, and he set a date within the three days.

Mr. E. Wilson: I shouldn't think so, sir. I think you still have charge of this hearing, and that you set and determine the time in which we will resume.

I may be all wrong. All that I would expect to do with the Court is ask the Court to enforce the subpoenas.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. E. Wilson: I think that is what I have just heard from my superior. The District Court would direct the witnesses to appear at a date to be set by the Trial Examiner.

Mr. W. Wilson: I wonder if it wouldn't be better, in connection with that, Mr. Wilson, that Mr. Wilson contact the different attorneys to ascertain what days we might be tied up. With three days notice, it might catch some of us in the middle of a trial.

Mr. E. Wilson: I think we might explore the situation in respect to the calendar of the various attorneys present. [93]

Trial Examiner: Wouldn't that be pretty difficult to do? You don't know when you will be able to get before a Judge, although possibly this week.

Mr. E. Wilson: I should certainly hope so. That is what I should endeavor to do. I do think, Mr. Trial Examiner, if we are to put off exploring the calendar condition indefinitely, we may find that we are too indefinite as to when we finally get back.

I think all counsel for the parties should be aware of the fact that we do have a hearing which is now being continued on through necessity that should resume as quickly as possible. They should now consider when they are setting up their calendars for the future the fact that this may be set down upon rather short notice.

Trial Examiner: Ask whatever questions you have in mind, then.

Mr. E. Wilson: I would like to know, for example, from Mr. Sheppard, if I may, what the condition of his calendar is within the next six weeks.

Mr. Sheppard: Outside of the next week, I really wouldn't know until I look at the calendar.

Mr. W. Wilson: I will have to call my office. I could call you back this afternoon.

Mr. E. Wilson: I wonder if that couldn't be done on the telephone now for the convenience of all the parties here.

Trial Examiner: It seems almost certain that at some time within the next six week period, there would be conflicts. If you feel that there is a reasonable likelihood of getting the subpoenas enforced this week, then why don't we talk about next week.

Mr. Hackler: May I, in that connection, make this inquiry. The charging parties have no objection to the continuance if the Government feels it is necessary to properly present the case. However, I think it is only fair to ask, in view of the nature of the objections here raised against these subpoenas, which seem to me to go to the authenticity of the subpoenas themselves as distinct from objections that are sometimes made as to scope, as to whether the parties, the attorneys who have petitioned to invoke on behalf of these witnesses, will obey, if an order, if one is forthcoming, forcing these [94] subpoenas out of the District Court, are contemplating appealing? There is certainly no purpose in thinking in terms of two or three weeks, and what suggests that to me is the nature of the

objection and the citation of authority given.

If counsel feels that his legal position is such that he would appeal, feel constrained to appeal an adverse ruling as to any of these subpoenas, the subpoena as well as subpoenas duces tecum, it would seem fruitless to me at the moment to explore the immediate future for a setting.

I don't know whether counsel is prepared to make a representation or statement of a view, but it seems rather odd here to take time out to get an order of enforcement if counsel, for policy reasons, knows that he will carry the matter beyond the District Court.

Mr. Johnson: In reply to that, speaking for the Lewis Food Company, I had made up my mind in one respect at the time that I entered this hearing, that a certain course of action would be taken, but since we started in this hearing, I have received a call from my office that the Teamsters Union has resumed its picketing and boycotting this morning at the plant, and that will affect my thinking on the matter, and I am not prepared to state what would be our position until I consult with my client, which I have not had a chance to do.

Trial Examiner: I doubt very much that we can accomplish anything by having counsel consider their calendar situation. I think perhaps the best thing to do is just go ahead as you planned with your petition to enforce, and then I will set a date, and set it as soon as possible, and of course, I will give whatever consideration I think the circumstances require to the situation of counsel.

Acting pursuant to this authority, the Board promulgated, in Section 102.35 of its Rules and Regulations, the rule that "the trial examiner shall have authority . . . (c) to rule upon petitions to revoke subpoenas."

We hold that this rule of procedure is within the legitimate purview of the Board's power under Section 6 of the Act. The Board, of course, may not enlarge its authority beyond the scope intended by Congress, but the Board, where such restrictive intention is not shown, may adopt rules and regulations to carry out its myriad functions in a manner consistent with the fulfillment of the purposes of the Act. This is exactly what has been done here.

III. *General Counsel As a Party to an Unfair Labor Practice Proceeding.*

We come then to the third question tendered by this appeal. Appellees assert that the General Counsel (or his representative) is not a party to an unfair labor practice proceeding and hence cannot obtain the issuance of subpoenas.

The term "party" is not defined in the Act. The definition contained in the Administrative Procedure Act is not decisive.[5] Again, we resort to related provisions, and the policies of the Act.

[fol. 98] This Court has declared that "in its broadest meaning the word 'party' includes one concerned with, conducting, or taking part in any matter or proceeding, whether he is named or participates as a formal party or not." *Fong Sik Leung* v. *Dulles*, 9 Cir., 226 F.2d 74, 81. Is the General Counsel under the Act a "party" to an unfair labor practice proceeding for purposes of securing the issuance of subpoenas?

The 1947 amendments to the National Labor Relations Act expanded the authority and enhanced the status of the

[5] Section 2(b) of the A.P.A. defines "party" as follows:

"Party includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding."

General Counsel in connection with the conduct of unfair labor practice proceedings.

> "By §3(d), supra, the authority formerly exercised by the Board to investigate charges and to issue complaints under §10 was vested in the general counsel. The well-understood purpose of Congress here was to effect a separation of the prosecuting and adjudicating functions within the Board." *Haleyon Drug Stores* v. *National Labor Relations Board*, 9 Cir., 187 F.2d 418, 421.

By virtue of §3(d) the General Counsel has "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board." His decision on whether to issue a complaint charging an unfair labor practice is final and is not reviewable by either the Board or the courts. *Lincourt* v. *National Labor Relations Board*, 1 Cir., 170 F.2d 306; *Hourihan* v. *National Labor Relations Board*, D.C. Cir., 201 F.2d 187; *Anthony* v. *National Labor Relations Board*, 6 Cir., 204 F.2d 832. If he decides to direct issuance of a complaint, it is his responsibility to prosecute the matter. In this role also he exercises broad powers. *International Union, etc.* v. *National Labor Relations Board*, 9 Cir., 231 F.2d 237, 242. Here then is an official who has life-or-death authority over the initiation of an unfair labor practice proceeding and who, if he determines that such proceedings should be commenced, is entrusted with the task of prosecution. Yet appellees urge that this official lacks authority to apply for the issuance of a subpoena. The argument is untenable.

The *Pesante* and *Duval* cases are neither contrary nor apposite. Both involved the question of whether a Regional [fol. 99] Director was a party to a representative hearing, as distinguished from an unfair labor practice proceeding.[*]

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[*] In *Pesante* the court held that a Regional Director was not a "party" in a representative hearing within the meaning of Section 11(1) of the Act and therefore was not entitled to the issuance of a subpoena. The Fifth Circuit, in the *Duval* case held directly contrary to *Pesante* and expressly rejected the reasoning in the latter opinion. Of course, we need not decide between the opposing views in the case at bar.

A Regional Director's duties in respect to representative hearings are far different from those the General Counsel performs in connection with unfair labor practice proceedings.

One point remains. It is that counsel for the General Counsel, not the General Counsel himself, sought the subpoenas. No citation of cases is necessary to restate the rule that in legal contemplation counsel representing counsel occupies the identical legal status of the person he represents. Therefore, if the General Counsel could apply for the issuance of subpoenas, as we have held, counsel representing him could also do so validly.

The order of the District Court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

[File endorsement omitted]

[fol. 100] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No: 15,307

NATIONAL LABOR RELATIONS BOARD, Appellant,

v.

D. B. LEWIS, President, LEWIS FOOD COMPANY, et al., Appellees.

JUDGMENT—Entered October 29, 1957

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the said District

Court in this cause be, and hereby is reversed, and that this cause be, and hereby is remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

[fol. 101] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 102]

SUPREME COURT OF THE UNITED STATES

No. 684, October Term, 1957

D. B. LEWIS, President, LEWIS FOOD COMPANY; HENRY MELLO; MAYNARD (MAC) FOLDEN; et al., Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD.

ORDER ALLOWING CERTIORARI—January 27, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is transferred to the summary calendar and assigned for argument immediately following No. 234.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsed]: No. 15307. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Appellant, vs. D. B. Lewis, President, Lewis Food Company, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: September 29, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15,307

NATIONAL LABOR RELATIONS BOARD,
Appellant,

v.

D. B. LEWIS, PRESIDENT, LEWIS FOOD COMPANY; HENRY MELLO; MAYNARD (MAC) FOLDEN; GRAMMONT BANVILLE; JOE LOERA; ANASTACIO HOLQUIN; WILLIAM L. (ROY) MILLER; OTTO SCHUBERT; WALTER O. LISSER; and WALTER SCHMIDT, SECRETARY-TREASURER OF ASSOCIATION OF INDEPENDENT WORKERS OF AMERICA,
Appellees.

STATEMENT OF POINTS UPON WHICH THE NATIONAL LABOR RELATIONS BOARD INTENDS TO RELY

1. The Trial Examiner had authority to rule upon appellees' petitions to revoke subpenas.

2. The subpenas were properly issued at the request of the General Counsel.

Dated at Washington, D.C. this 1st day of November, 1956.

/s/ MARCEL MALLET-PREVOST
Assistant General Counsel, National Labor Relations Board.

[Endorsed]: Filed Nov. 5, 1956. Paul P. O'Brien, Clerk.

[fol. 88] Minute Entry of Argument and Submission—May 14, 1957 (omitted in printing).

[fol. 89]

In United States Court of Appeals
for the Ninth Circuit

Before: Fee, Barnes and Hamley, Circuit Judges.

Minute Entry of Order Directing Filing of Opinion and Filing & Recording of Judgment—October 29, 1957

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

[fol. 90]

In United States Court of Appeals
for the Ninth Circuit

No. 15,307

National Labor Relations Board, Appellant,

v.

D. B. Lewis, President, Lewis Food Company; Henry Mello; Maynard (Mac) Folden; Grammont Banville; Joe Loera; Anastacio Holquin; William L. (Roy) Miller; Otto Schubert; Walter O. Lisser; and Walter Schmidt, Secretary-Treasurer of Association of Independent Workers of America, Appellees.

Appeal From the United States District Court for the Southern District of California,
Central Division.

OPINION—October 29, 1957

Before: Fee, Barnes and Hamley, Circuit Judges

Barnes, Circuit Judge:

The National Labor Relations Board appeals from an order of the District Court denying enforcement to certain subpoenas duces tecum and ad testificandum purportedly issued by the Board and directed to the appellees.

On April 30, 1956, the General Counsel, by the Regional Director in Los Angeles, California, filed a consolidated complaint against the Lewis Food Company and the Association of Independent Workers of America, alleging that the company and the union were engaging in various unfair labor practices in violation of the Labor-Management Relations Act of 1947, (hereafter "Act"). Pursuant to the written request of counsel for the General Counsel, the Regional Director, acting under Section 11(1) of the Act, [fol. 91] issued the subpoenas in question under the seal of the Board and the facsimile signature of Abe Murdock, a member of the Board. Appellees filed petitions to revoke the subpoenas with the Regional Director principally on the grounds that (1) the Board lacked authority to delegate its power to issue subpoenas to the Regional Director, and (2) counsel representing the General Counsel is not a "party" to an unfair labor practice proceeding and therefore is not entitled to the issuance of subpoenas. The Regional Director referred the petitions to the trial examiner. The trial examiner refused to quash the subpoenas. Appellees remained adamant in their determination not to comply with the subpoenas. The Board then filed with the court below an application for an order requiring appellees to obey the subpoenas. The unfair labor practice proceeding was continued pending the disposition of this matter. The appellees resisted enforcement of the subpoenas on the two grounds stated above, and additionally, on the ground that the trial examiner lacked authority to pass upon their petitions. The court below sustained their position without opinion, citing only the decision in *National Labor Relations Board* v. *Pesante*, S.D. Calif., 119 F.Supp. 444.

There are three questions raised by this appeal. (1) Does the Board have authority under the Act to delegate

to its subordinate, the Regional Director; the power to issue subpoenas? (2) Does the trial examiner have authority to rule on petitions to revoke subpoenas? (3) May a valid subpoena be issued at the request of counsel for the General Counsel?

Board counsel conceded on oral argument that the Board must prevail on all three issues to gain a reversal. Each issue turns on the meaning of Section 11(1) of the Act.[1] They will be discussed in the order stated above.

[fol. 92] I. *Delegation of Power to Issue Subpoenas*

Section 11(1) provides that the "Board, or any member thereof" may issue subpoenas. Appellees' argument, in essence, is that the section means what it says, the Congress knew how to make the power delegable if it wanted to do so as evidenced by other portions of Section 11(1) author-

[1] It provides: "Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whole production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place in the United States or any Territory or possession thereof, at any designated place of hearing."

izing the Board or "its duly authorized agents or agencies" to perform certain functions, and that Congress' failure to make the power expressly delegable manifests an intention that it be non-delegable.

This question and the next one relating to the delegation of power to pass on petitions to revoke subpoenas pose similar problems of statutory construction. The basic problem, and a frequently recurring one in modern times, is to ascertain whether when a particular power is granted to a person or body of persons, the power is delegable to subordinates, and if delegable at all, to which subordinates it is delegable.

In each instance in the case at bar Section 11(1) explicitly empowers only the Board, or a member thereof, to perform certain functions. Nowhere does the Act make the particular powers delegable, but neither does it anywhere expressly prohibit delegation. Does this silence indicate prohibition or permission?

There is no short and automatic answer to this difficult and complex but very practical question. There is not even the frequently found presumption with which to tilt the [fol. 93] scales. The determination of the question calls for a studied consideration of the Act, its legislative history, and its legislative objectives.

We start the journey, as with all statutes, by examining the literal wording of the section. The language of a statute is the best and most reliable index of its meaning. Where the language is clear and unequivocal it is determinative unless the literal language does not comport with the intent and objectives of the statute viewed as a whole. However, where as in the instant cause, the statute is completely silent on the point in question, it is necessary to analyze that statute as a whole, and its history and purposes, to ascertain what interpretation must be ascribed to the silence.

In regard to the delegability of the Board's subpoena issuing power to a Regional Director, no court which has considered this question has construed Section 11(1) of the Act in the narrow and restricted manner appellees urge upon us. On the contrary, all courts which have passed on the merits of this issue have interpreted the statute as

empowering the Board to delegate the subpoena power. The leading decision on this precise point is *National Labor Relations Board* v. *John S. Barnes Corp.*, 7 Cir., 178 F.2d 156, where the Court held that a subpoena issued by a Regional Director under the facsimile signature of a Board member is valid. That decision has had the subsequent approval of the Fifth Circuit. *Edwards* v. *National Labor Relations Board*, 5 Cir., 189 F.2d 970; *Jackson Packing Co.* v. *National Labor Relations Board*, 5 Cir., 204 F.2d 842. Even the *Pesante* decision, supra, held in favor of the Board on this question. The opinion in the *Barnes* case is sound and well-reasoned. It is fully consonant with the policies and purposes of the Act. Appellees put forth no reasons which persuade us that these cases are erroneous and should be disapproved. Therefore, we hold that subpoenas may validly be issued by a Regional Director under the facsimile signature of a Board member.

There is nothing in the Supreme Court opinions in *Cudahy Packing Co.* v. *Holland*, 315 U.S. 357, and *Fleming* v. *Mohawk*, 331 U.S. 111, which compels a different result or casts doubt upon the validity of our resolution of this issue. Those cases are not controlling. The *Cudahy* decision merely held that the Fair Labor Standards Act did not [fol. 94] grant the Administrator the power to delegate his subpoena power to subordinates, while on the other hand, the *Mohawk* case held that the Administrator of the Emergency Price Control Act was authorized to delegate the authority to issue subpoenas. Each of those cases involved the construction of a statute different from that which concerns us. Accordingly, those decisions, one upholding the delegability of this power and the other denying it, do not govern the instant case.

II. *Delegation of Power to Revoke Subpoenas*

Section 11(1) states in pertinent part that "The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas" and that the person to whom the subpoena is directed "may petition the Board to revoke, and the Board shall revoke, such subpoena" if the evidence sought is not relevant or is not described with sufficient particularity.

The trial examiner, not the Board, denied appellees' petitions to revoke the subpoenas. It was his action which was reviewed by the court below. If he lacked authority to pass on these petitions, then there has been no review of this matter by the proper administrative body. If such be the posture of these proceedings, it was premature to bring these proceedings before the court below before the proper and duly constituted body had passed on the petitions. Thus, if appellees' position be sustained on this point, the order denying enforcement must be affirmed.

The court below relied solely on the *Pesante* decision. There it was held that only the Board itself is authorized by Section 11(1) to sit on petitions to revoke subpoenas. The Fifth Circuit in *National Labor Relations Board* v. *Duval Jewelry Co., et al.*, 243 F.2d 427, agreed with the *Pesante* decision insofar as subpoenas duces tecum are concerned. In respect to subpoenas ad testificandum, the Fifth Circuit held that since Section 11(1) on its face makes no provision as to procedure to test the validity of subpoenas of this type, application for their enforcement cannot be considered premature even if initially reviewed by a trial examiner.[2]

[fol. 95] The Seventh Circuit takes a different view. In *National Labor Relations Board* v. *Gunaca*, 7 Cir., 230 F.2d 542, it affirmed, on the opinion below, *N.L.R.B.* v. *Gunaca*, 135 F.Supp. 799, a decision upholding the right of a trial examiner to pass on petitions to revoke subpoenas.[3] Both the Court of Appeals and the District Court in the *Gunaca* case considered the *Pesante* case, and the considerations therein set forth, and refused to follow. This is also the position taken by then District Judge Medina in *National Labor Relations Board* v. *International Typographical Union*, 76 F.Supp. 895. For the reasons hereinafter set forth, we believe that this is the correct view.

The approach taken in the *Pesante* and *Duval* cases is that the Act itself bars delegation. We find no such preclusion. Certainly there is no express negation of the

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[2] We need not pass on the validity of this distinction in light of our resolution of this issue.

[3] See also N.L.R.B. v. John S. Barnes Corp., supra.

power to delegate. The Act sanctions the Board to rule on these petitions; but it does not expressly forbid the Board to delegate this function. Nor do we feel it mandatory to imply such an intent. The Congressional history, though somewhat favorable to appellees' position, is realistically meager and inconclusive.[1] The Act was discussed prolifically in Congress, but the delegability of powers granted by Section 11(1) was not. We concur in Judge Grubb's statements in the *Gunaca* case, supra, 135 F.Supp. at 794:

> [fol. 96] "It would seem to this Court that one should be very slow to presume that the Congress intended to enact a statute which would require a review of testimony possibly two or three thousand miles from the place where the testimony was taken after having it transcribed with all the attendant delays and expense in proceeding before the N.L.R.B. that would be involved. Such construction would make it impossible as a practical matter for the N.L.R.B. to carry out its functions. Certainly they couldn't carry them out expeditiously as Congress no doubt intended. Labor peace or proper labor relations would be sacrificed to innumerable administrative delays . . . Such construction would put an impossible burden on the Board."

[1] The original House Bill, H.R. 3021, provided that a person to whom a subpoena had been directed could "petition the Board, or its duly authorized agent or agents, to revoke and the Board, or such agent or agents, shall revoke such subpoena if in its, his, or their opinion, as the case may be, the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its, his, or their opinion, as the case may be, such subpoena does not describe with sufficient particularity the evidence whose production is required." The original Senate Bill, S. 1126, contained no provision dealing with petitions to revoke subpoenas. The Section as finally approved was essentially the House version with the express delegation of power to pass on petitions to revoke subpoenas deleted. Whether this revision was made because it was felt that the added language was superfluous or because Congress doubted the wisdom of granting this power to anyone other than the Board itself, is not disclosed by the Committee or Conference reports or Congressional debates. Taken alone, the change of language, while helpful to appellees, is not persuasive.

The Court of Appeals approves Judge Grubb's "well reasoned opinion," considers his conclusions sound, and his result correct.

The N.L.R.B. was established to facilitate the peaceful settlement of labor disputes. The practical difficulties in administration which would arise as a consequence of holding that the power to rule on petitions to revoke subpoenas is non-delegable would substantially impede the effectuation of the Board's primary function. Accordingly, it is unreasonable to attribute to Congress an intention to compel such a result.

If the power to delegate has not been withdrawn, as we believe it has not, has it been granted affirmatively?

The *Mohawk* decision supplies the answer to that question. There, as here, the particular statute in question contained a broad rule-making power. Section 201(d) of the Emergency Price Control Act provided:

> "The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper to carry out the purposes and provisions of this Act."

Addressing itself to the question of whether this Section could be relied upon as a basis for delegating certain functions, the Supreme Court said, 331 U.S. at 121,

> "Such a rule-making power may itself be an adequate source of authority to delegate a particular function, [fol. 97] unless by express provision of the Act or by implication it has been withheld. See Piapao Laboratories v. Farley, 67 App.D.C. 304, 92 F.2d 228."

Section 6 of the Labor-Management Relations Act vests the Board with as much rule-making authority as that possessed by the Administrator under the E.P.C.A. It reads:

> "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter."

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IN THE

Supreme Court of the United States

October Term, 1957

No. 684

D. B. LEWIS, PRESIDENT, LEWIS FOOD COMPANY; HENRY MELLO; MAYNARD (MAC) FOLDEN; GRAMMONT BANVILLE; JOE LOERA; ANASTACIO HOLQUIN; WILLIAM L. (ROY) MILLER; OTTO SCHUBERT; WALTER O. LISSER; AND WALTER SCHMIDT, SECRETARY-TREASURER OF ASSOCIATION OF INDEPENDENT WORKERS OF AMERICA,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

HILL, FARRER & BURRILL,
RAY L. JOHNSON, JR.,
WILLIAM H. WILSON,
411 West Fifth Street,
Los Angeles 13, California,
Attorneys for D. B. Lewis, President, Lewis Food Company, Henry Mello, Maynard (Mac) Folden and Grammont Banville.

ALVA C. BAIRD,
G. A. SHEPPARD,
458 South Spring Street,
Los Angeles 13, California,
Attorneys for Remaining Petitioners

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IN THE

Supreme Court of the United States

October Term, 1957

No. .....

D. B. LEWIS, PRESIDENT, LEWIS FOOD COMPANY; HENRY MELLO; MAYNARD (MAC) FOLDEN; GRAMMONT BANVILLE; JOE LOERA; ANASTACIO HOLQUIN; WILLIAM L. (ROY) MILLER; OTTO SCHUBERT; WALTER O. LISSER; AND WALTER SCHMIDT, SECRETARY-TREASURER OF ASSOCIATION OF INDEPENDENT WORKERS OF AMERICA,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on October 29, 1957, granting the National Labor Relations Board's (hereinafter referred to as the "Board") request for enforcement of subpoenas *duces tecum* and *ad testificandum* directed to petitioners.

Opinions Below.

The opinion of the court below (Appendix A, *infra*) is not yet officially reported. The District Court rendered no opinion. The order of the District Court is set forth at R. 83-84. ("R" references are to the printed transcript of record used in the court below.)

Jurisdiction.

The judgment of the court below (Appendix B, *infra*) was made and entered on October 29, 1957. The jurisdiction of this court is invoked under 28 U. S. C. 1254.

Questions Presented.

At the written request of counsel for the General Counsel, the Regional Director of the Board (at Los Angeles) issued certain subpoenas *ad testificandum* and *duces tecum* directed to petitioners under the seal of the Board and under the facsimile signature of Abe Murdock, a member of the Board [R. 30-43]. Petitioners filed petitions to revoke subpoenas with the Regional Director. The Regional Director referred the petitions to revoke subpoenas to the Trial Examiner, who denied the petitions. Petitioners refused to obey the subpoenas. The Board filed with the District Court an application for an order requiring petitioners to obey the subpoenas. The District Court issued its order quashing the subpoenas. On appeal to the United States Court of Appeals for the Ninth Circuit, the order of the District Court quashing the subpoenas was reversed.

The questions presented are:

(1) Whether the Board has power under the National Labor Relations Act, as amended, to delegate to subordinates the authority to issue subpoenas;

(2) Whether the Board has power under the National Labor Relations Act, as amended, to delegate to subordinates the authority to rule upon a petition to revoke a subpoena;

(3) Whether under the National Labor Relations Act, as amended, and Board Rules and Regulations, a subpoena may be issued upon the application of an attorney employed by the General Counsel of the Board.

Statutes and Regulations Involved.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*) and of the Board's Rules and Regulations (29 C. F. R. 102.1, *et seq.*, Supp. 1956) are set forth in the body of the petition.

Statement.

On April 30, 1956, the General Counsel of the Board issued through the Regional Director of Los Angeles a consolidated complaint against petitioners alleging unfair labor practices in violation of Section 8(a)(1), (2) and (3) of the Act and Section 8(b)(1)(A) and (2) of the Act. The consolidated complaint was issued and served on petitioners, together with a notice that a hearing would be conducted before a Trial Examiner of the Board on the allegations set forth in the complaint [R. 19-26].

On June 1, 4 and 5, 1956, at the request of an attorney for the General Counsel, the Regional Director at Los Angeles issued subpoenas *ad testificandum* and *duces tecum* directed to petitioners under the seal of the Board and under the facsimile signature of Abe Murdock, a member of the Board [R. 30-43].

On June 11, 1956, petitioners filed petitions to revoke subpoenas with the Regional Director asserting that (1) the Board could not delegate its power to issue subpoenas to the Regional Director, and (2) an attorney for the General Counsel is not a party to the unfair labor practice proceedings and hence is not entitled to the issuance of subpoenas. As to the *subpoenas duces tecum*, Petitioners Lewis and Schmidt also challenged the relevancy of the records and documents required to be produced [R. 44-51].

On June 11, 1956, the Regional Director referred the petitions to revoke subpoenas to a Trial Examiner who denied the petitions. Petitioners, nevertheless, refused to obey the subpoenas [R. 51-80].

The Board, by its General Counsel, on June 29, 1956, filed with the District Court an application for an order requiring petitioners to obey the subpoenas involved herein [R. 3-9].

Petitioners resisted enforcement of the subpoenas on the grounds that (1) the Regional Director did not have authority to issue the subpoenas; (2) the Trial Examiner did not have authority to rule upon petitioner's petitions to revoke subpoenas; and (3) an attorney for the General Counsel is not entitled to the issuance of subpoenas upon his application, since he is not a party to the proceedings. The objections to the relevancy of the documents and records required to be produced by the subpoenas addressed to Lewis and Schmidt were not renewed.

On July 30, 1956, the District Court issued its order quashing the subpoenas on the authority of *N. L. R. B. v. Pesante*, 119 Fed. Supp. 444 [R. 83-84]. The *Pesante* case held (1) that subpoenas issued under facsimile of

a Board member are valid under the Act; (2) however, that the Board must itself pass upon petitions to revoke subpoenas; and (3) that the General Counsel is not a "party" to a Board proceeding and hence neither he nor the attorneys under his supervision may request subpoenas.

On appeal the Court of Appeals reversed the order of the District Court. The Court dealt only briefly with the question of the power of the Board to delegate authority to issue subpoenas, citing *N. L. R. B. v. John S. Barnes Corp.* (7 Cir.), 178 F. 2d 156, where the Court held that a subpoena issued by a Regional Director under the facsimile signature of a Board member is valid.

On the power of the Board to delegate authority to a Trial Examiner to rule on petitions to revoke subpoenas, the Court noted that there was a conflict among the Circuits. The *Pesante* case, *supra*, 119 Fed. Supp. 444 and *N. L. R. B. v. Duval Jewelry Co.* (5 Cir.), 243 F. 2d 427, certiorari granted in the United States Supreme Court, October Term 1957, No. 234, hold that only the Board itself is authorized by Section 11(1) to hear petitions to revoke subpoenas; on the other hand, the Seventh Circuit takes a different view in *N. L. R. B. v. Gunaca*, 230 F. 2d 542. The Seventh Circuit decision is in accord with the decision in *N. L. R. B. v. International Typographical Union*, 76 Fed. Supp. 895. The Ninth Circuit followed the decision of the Seventh Circuit in the *Gunaca* case, *supra*, 230 F. 2d 542.

The Ninth Circuit Court agrees with petitioners that the statute itself and the legislative history are "somewhat favorable to appellees' [petitioners'] position." However, under a "rule of convenience" the Ninth Circuit finds that a holding that the power to rule on petitions

to revoke subpoenas is non-delegable "would substantially impede the effectuation of the Board's primary function." The Court concludes that, since the power to delegate has not been expressly or impliedly withdrawn under the statute, the Board under its rule-making authority (Sec. 6 of the Act) has the power to issue a rule delegating authority to a Trial Examiner to rule upon petitions to revoke subpoenas.

Finally, the Ninth Circuit held that the General Counsel is a party to an unfair labor practice proceeding relying primarily on Section 3(d) of the Act, which gives the General Counsel "Final authority on behalf of the Board in respect of the investigation of charges and issuance of the complaints under section 10, and in respect of the prosecution of such complaints before the Board." The Court distinguished the *Pesante* case, *supra*, which held that a Regional Director of the Board is not a party to a representation proceeding. The Ninth Circuit did not discuss the effect of Section 102.8 of the Board's Rules and Regulations, which does not include General Counsel within the definition of "party."

Reasons for Granting the Writ.

The holding of the Court below has an important impact upon the rights of the citizens of the United States, since it grants unlimited authority to an administrative body to delegate the exercise of the subpoena power—a power capable of oppressive use. The decision also has an important effect in the administration of the Act. The decision of the Court below involves a direct conflict with the decision of the Fifth Circuit in the case of *N. L. R. B. v. Duval Jewelry Co.*, *supra*, 243 F. 2d 427, certiorari granted in the Supreme Court of the United States,

October Term 1957, No. 234. The holding of the Court below presents a question concerning the proper application of this Court's decisions in *Cudahy Packing Co. v. Holland*, 315 U. S. 357 and *Fleming v. Mohawk Co.*, 331 U. S. 111.

We contend that the terms of the Act itself demonstrate conclusively that the subpoena power is not delegable. We further contend that the legislative history of the Act and the cases in point also support this view.

Section 11 of the Act provides with respect to the subpoena power as follows:

> "Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—
>
> "(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its

opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing."

The Court will note that there are five sentences in subsection (1) of Section 11. The fifth sentence can be disregarded for present purposes. The Court's attention is called to a comparison of the first and fourth sentences as against the second and third sentences.

The first sentence, in providing for the examination of evidence and the right to copy evidence, gives the power to the Board "or its duly authorized agents or agencies" —a clear authority to delegate that power.

The fourth sentence, in providing for the administering of oaths, examination of witnesses and the receiving of evidence, also vests the power in any member of the Board "or any agent or agency designated by the Board for such purposes." Here again the authority given to the Board may be delegated.

On the other hand, the second sentence, which provides for the issuance of subpoenas, gives the power only to "The Board, or any member thereof." In the third sentence which provides for revocation of the subpoena, the power is given to "the Board."

The Ninth Circuit Court holds that there is no expressed or implied negation of the power to delegate in the Act. This is contrary to the approach taken in the

Pesante case, *supra*, 119 Fed. Supp. 444, and the *Duval* case, *supra*, 243 F. 2d 427, where the courts found that the Act itself bars delegation.

It is submitted that any person who reads Section 11(1) must conclude without reference to the legislative history, cases or other aids to construction, that Congress specifically provided for delegation by the Board when it intended such delegation and omitted the power to delegate when it intended that the Board, or a member thereof, should not delegate. If a statute is clear, the Court need not go outside the statute to construe it.

In addition to the clear language of the statute, the legislative history of the Act establishes that Congress intended that the power to issue subpoenas and to revoke subpoenas could not be delegated. References hereafter are to "Legislative History of the Labor Management Relations Act, 1947, Vol. I (National Labor Relations Board, 1948)."

The first step in the legislative process was H. R. 3020, as reported by the Committee on Education and Labor and as it passed the House of Representatives initially. (Legislative History, *op. cit.*, pp. 74, 201.) This version provided as follows:

> "Sec. 11. For the purpose of any proceeding before the Board, or before a member, examiner, or examiners thereof, or for the purpose of any investigation by the Administrator under Section 9—
>
> "(1) The Board, or any member thereof, *or any trial examiner* shall, upon application of the Administrator or any party to such proceedings, forthwith issue to the Administrator or to such party as the case may be, in the name of the Board, subpoenas requiring the attendance and testimony of witnesses

or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence or under his control, such person may petition the Board, *or its duly authorized agent or agents*, to revoke and the Board, *or such agent or agents*, shall revoke such subpoena if in its, *his or their* opinion, as the case may be, the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its, *his or their* opinion, as the case may be such subpoena does not describe with sufficient particularity the evidence whose production is required. The Administrator, or any member of the Board, *or any examiner or examiners designated by the Board for such purposes*, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing." (Emphasis added.)

The language which should be noted particularly is italicized.

The original Senate version, S. 1126, as reported by the Committee on Labor and Public Welfare and H. R. 3020 as it passed the Senate initially, both provided as follows (Legislative History, *op. cit.*, pp. 133, 261):

"Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

"(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access

to, for the purpose of examination, nd the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent or agency conducting the hearing or investigation. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing."

The Court will note that the Senate Bill contained language entirely different from the House Bill.

Section 11(1) of the Act, as finally adopted (29 U. S. C. A. (Supp.), Sec. 161), is a compromise between the House and the Senate versions. The House provision for an automatic issuance of a subpoena plus the power to revoke was adopted, but the language of the House version regarding delegation of the subpoena power to a "trial examiner" (in the case of issuance of the subpoena) and the delegation to "duly authorized agent or agents" (in the case of revocation of the subpoena) was omitted. In addition, the Senate version was changed to permit the Board to issue subpoenas as well as "any member of the Board."

With reference to the legislative history, the Ninth Circuit recognizes that Congressional action was "favor-

able" to petitioners' position, but is "inconclusive." Having made the statement, the Court then drops its discussion of Congressional history and applies what we prefer to call a "rule of convenience," finding that it would make it extremely difficult, as a practical matter, for the Board to carry out its functions, if it did not have power to delegate the subpoena power. In our view, the Seventh and Ninth Circuits are engaging in judicial legislation and have failed to uphold the statute as written.

We submit that the change in language between the original House version and the final statute must lead to the conclusion that the Congress intended to permit delegation with respect to the powers granted in the first and fourth sentences of Section 11(1), but did not intend to permit delegation with respect to the power of issuing and revoking subpoenas contained in the second and third sentences.

The Ninth Circuit Court upheld the Board's delegation of power to revoke subpoenas under the rule-making power vested in the Board by virtue of Section 6 of the Act. The rule-making power can not serve as a source of delegation where the statute expressly, or by implication, withholds such power. *Fleming v. Mohawk Company, supra,* 331 U. S. 111, 121. An agency rule can not change positive provisions of the statute. *United States v. Gredzens,* 125 Fed. Supp. 867. We submit that the Act and the legislative history thereof clearly indicate that Congress intended that the Board itself exercise the subpoena power and that such power can not be delegated by rule, or otherwise.

This Court has expressed itself on the subject of delegation of the subpoena power in *Cudahy Packing Co. v.*

Holland, 315 U. S. 357 and *Fleming v. Mohawk Wrecking and Lumber Co.*, 331 U. S. 111. The Ninth Circuit Court held that these cases are not controlling, since they involved construction of a statute different from the National Labor Relations Act. The statute under construction in the *Cudahy* case, *supra*, 315 U. S. 357, is almost exactly the same as Section 11 of the National Labor Relations Act. We contend that the principles enunciated in the *Cudahy* case, *supra*, 315 U. S. 357, and the *Fleming* case, *supra*, 331 U. S. 111, are controlling and that a comparison of the two cases will show that the present case is governed by the *Cudahy* case.

The *Cudahy* case held that the Administrator of the Fair Labor Standard Act did *not* have the power to delegate to his subordinates the authority to issue subpoenas. This Court said in part (313 U. S. 365):

> "The entire history of the legislation controlling the use of subpoenas by administrative officers indicates a Congressional purpose not to authorize by implication the delegation of the subpoena power."

The legislative history of the Fair Labor Standards Act involved in the *Cudahy* case showed that a provision granting authority to delegate the subpoena power had been eliminated when the Bill was in Conference. We have already pointed out in connection with the present Act that the house bill provided for delegation of the subpoena power but that in Conference this provision was eliminated.

This Court said in the *Fleming* case, *supra*, 331 U. S. 111, 121, that under the rule-making power an agency may delegate a particular function, "unless by an express provision of the Act or *by implication* it has been with-

held." (Emphasis added.) The present Act has, by implication, clearly withheld the power to delegate the subpoena power. Therefore, the existence of the rule-making power is not sufficient to overcome the implication of the statute.

The Ninth Circuit upholds the power to delegate on the basis that it would be difficult for the Board to perform personally the subpoena function.

It is, of course, true that if the National Labor Relations Board followed the plain and simple dictates of the Act and subpoenas were issued by the Board or members of the Board, and revoked by the Board the members would have more work than if they merely signed a stack of subpoenas in blank and permit the Regional Director and the Trial Examiner to issue and revoke them. But there is good reason why that should be so. The *Cudahy* case stated the principle very well in answer to the argument that it would be hard for the Administrator of the Fair Labor Standards Act to issue the subpoenas personally (315 U. S. 357, 363):

> "The Administrator . . . points to the wide range of duties imposed upon him, the vast extent of his territorial jurisdiction, and the large number of investigations required for the enforcement of the Act. From this he argues that Congress must have intended that he should be permitted to delegate his authority to sign and issue subpoenas. But this argument loses force when examined in the light of related provisions of the Act and of the actual course of Congressional legislation in this field.
>
> "Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of

oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer."

We think the conclusion is inescapable that every factor under consideration by this Court points to the result reached in the *Cudahy* case—the subpoena power is not delegable.

Finally, we contend that the subpoenas here involved are invalid because they were issued without a proper application therefor. Section 11(d) of the Act provides that a subpoena shall be issued "upon application of any party to such proceedings." The term "party" is not defined in the Act. Section 2(b) of the Administrative Procedure Act defines "party" as follows:

> "'Party' includes any person or agency named or admitted as a party, or properly acting and entitled as of right to be admitted as a party, in any agency proceeding."

Section 6 of the Administrative Procedure Act provides:

> "Agency subpoenas authorized by law shall be issued to any *party* upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought." (Emphasis added.)

It is clear that under the Administrative Procedure Act the General Counsel and counsel for the General Counsel are not parties to this proceeding since they have not been named or admitted as a party.

Section 102.58(c) of the Board's Rules and Regulations provides that a subpoena shall be issued "upon

application . . . in writing by any party." Section 102.8 of the Board's Rules and Regulations provides:

> "The term 'party' as used herein shall mean the regional director in whose region the proceeding is pending, and any person named or admitted as a party, or properly acting and entitled as of right to be admitted as a party. . . ."

The Ninth Circuit Court failed completely to discuss the effect of the Board's own Rules and Regulations which defined the term "party." With reference to the definition contained in the Administrative Procedure Act, the court below said that the definition "is not decisive."

Under the Board's own definition of "party," as set forth above, it is apparent that the applications for the subpoenas were not made by a "party" as required by the Act and by the regulations. The application for every subpoena was made by E. Don Wilson described in the subpoenas as "counsel for the General Counsel."

The Ninth Circuit Court found that the General Counsel is a party to an unfair labor practice proceeding under the authority of Section 3(d) of the Act and the Ninth Circuit Court's definition of "party," as including any one taking part in a proceeding. (*Fong Sik Leun v. Dulles*, 226 F. 2d 74, 81.)

The usual legal definition of a "party" certainly does not include an attorney (as such). The generally accepted definition of "party" is entirely at odds with the view that the General Counsel, or his attorney, who are representatives and employees of the Board, are parties.

There is no basis for a construction of the word "party" to include persons directly associated with the agency before whom both sides (union and management) in an adversary proceeding are submitting, or are about to submit, their causes. In the *Pesante* case, *supra*, 119 Fed. Supp. 444, the District Court stated that in its opinion Congress by the Act and the Board by its regulations intended to, and did, leave it up to the adversaries (union and management) to apply for subpoenas.

We contend that the General Counsel is no more a party to this proceeding than would be the Solicitor General in a proceeding brought on behalf of the United States Government. The General Counsel is not a party as defined in the Administrative Procedure Act or the Board regulations. It follows that the subpoenas are invalid because they were issued without a proper application therefor.

The questions presented by this case are of great and recurring significance in the administration of the National Labor Relations Act. The important nature of these issues has already been recognized by this Court when it granted certiorari in the case of *N. L. R. B. v. Duval Jewelry Co.*, October Term 1957, No. 234. The serious questions of public policy involved here and the effect of the decision below, if unreversed, upon the rights of the citizens of this country, make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

Conclusion.

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

WILLIAM M. FARRER and
RAY L. JOHNSON, JR. for
HILL, FARRER & BURRILL,
WILLIAM H. WILSON,
Attorneys for D. B. Lewis, President, Lewis Food Company; Henry Mello; Maynard (Mac) Folden and Grammont Banville.

G. A. SHEPPARD for
ALVA C. BAIRD,
Attorneys for Remaining Petitioners.



APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, Appellant, vs. D. B. Lewis, President, Lewis Food Company; Henry Mello; Maynard (Mac) Folden; Grammont Barnville; Joe Loera; Anastacio Holquin; William L. (Roy) Miller; Otto Schubert; Walter O. Lisser; and Walter Schmidt, Secretary-Treasurer of Association of Independent Workers of America, Appellees. No. 15,307.

Filed October 29, 1957.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: FEE, BARNES and HAMLEY, Circuit Judges.

BARNES, *Circuit Judge:*

The National Labor Relations Board appeals from an order of the District Court denying enforcement to certain subpoenas duces tecum and ad testificandum purportedly issued by the Board and directed to the appellees.

On April 30, 1956, the General Counsel, by the Regional Director in Los Angeles, California, filed a consolidated complaint against the Lewis Food Company and the Association of Independent Workers of America, alleging that the company and the union were engaging in various unfair labor practices in violation of the Labor-Management Relations Act of 1947, (hereafter "Act"). Pursuant to the written request of counsel for the General Counsel, the Regional Director, acting under Section 11(1) of the Act, issued the subpoenas in question

under the seal of the Board and the facsimile signature of Abe Murdock, a member of the Board. Appellees filed petitions to revoke the subpoenas with the Regional Director principally on the grounds that (1) the Board lacked authority to delegate its power to issue subpoenas to the Regional Director, and (2) counsel representing the General Counsel is not a "party" to an unfair labor practice proceeding and therefore is not entitled to the issuance of subpoenas. The Regional Director referred the petitions to the trial examiner. The trial examiner refused to quash the subpoenas. Appellees remained adamant in their determination not to comply with the subpoenas. The Board then filed with the court below an application for an order requiring appellees to obey the subpoenas. The unfair labor practice proceeding was continued pending the disposition of this matter. The appellees resisted enforcement of the subpoenas on the two grounds stated above, and additionally, on the ground that the trial examiner lacked authority to pass upon their petitions. The court below sustained their position without opinion, citing only the decision in National Labor Relations Board v. Pesante, S. D. Calif., 119 F. Supp. 444.

There are three questions raised by this appeal. (1) Does the Board have authority under the Act to delegate to its subordinate, the Regional Director, the power to issue subpoenas? (2) Does the trial examiner have authority to rule on petitions to revoke subpoenas? (3) May a valid subpoena be issued at the request of counsel for the General Counsel?

Board counsel conceded on oral argument that the Board must prevail on all three issues to gain a reversal.

Each issue turns on the meaning of Section 11(1) of the Act.[1] They will be discussed in the order stated above.

I. *Delegation of Power to Issue Subpoenas*

Section 11(1) provides that the "Board, or any member thereof" may issue subpoenas. Appellees' argument, in essence, is that the section means what it says, the Congress knew how to make the power delegable if it wanted to do so as evidenced by other portions of Section 11(1) authorizing the Board or "its duly authorized agents or agencies" to perform certain functions, and that Congress' failure to make the power expressly delegable manifests an intention that it be non-delegable.

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[1] It provides: "Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whole production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place in the United States or any Territory or possession thereof, at any designated place of hearing."

This question and the next one relating to the delegation of power to pass on petitions to revoke subpoenas pose similar problems of statutory construction. The basic problem, and a frequently recurring one in modern times, is to ascertain whether when a particular power is granted to a person or body of persons, the power is delegable to subordinates, and if delegable at all, to which subordinates it is delegable.

In each instance in the case at bar Section 11(1) explicitly empowers only the Board, or a member thereof, to perform certain functions. Nowhere does the Act make the particular powers delegable, but neither does it anywhere expressly prohibit delegation. Does this silence indicate prohibition or permission?

There is no short and automatic answer to this difficult and complex but very practical question. There is not even the frequently found presumption with which to tilt the scales. The determination of the question calls for a studied consideration of the Act, its legislative history, and its legislative objectives.

We start the journey, as with all statutes, by examining the literal wording of the section. The language of a statute is the best and most reliable index of its meaning. Where the language is clear and unequivocal it is determinative unless the literal language does not comport with the intent and objectives of the statute viewed as a whole. However, where as in the instant cause, the statute is completely silent on the point in question, it is necessary to analyze that statute as a whole, and its history and purposes, to ascertain what interpretation must be ascribed to the silence.

In regard to the delegability of the Board's subpoena issuing power to a Regional Director, no court which has considered this question has construed Section 11(1) of the Act in the narrow and restricted manner appellees urge upon us. On the contrary, all courts which have passed on the merits of this issue have interpreted the statute as empowering the Board to delegate the subpoena power. The leading decision on this precise point is National Labor Relations Board v. John S. Barnes Corp., 7 Cir., 178 F. 2d 156, where the Court held that a subpoena issued by a Regional Director under the facsimile signature of a Board member is valid. That decision has had the subsequent approval of the Fifth Circuit. Edwards v. National Labor Relations Board, 5 Cir., 189 F. 2d 970; Jackson Packing Co. v. National Labor Relations Board, 5 Cir., 204 F. 2d 842. Even the Pesante decision, supra, held in favor of the Board on this question. The opinion in the Barnes case is sound and well-reasoned. It is fully consonant with the policies and purposes of the Act. Appellees put forth no reasons which persuade us that these cases are erroneous and should be disapproved. Therefore, we hold that subpoenas may validly be issued by a Regional Director under the facsimile signature of a Board member.

There is nothing in the Supreme Court opinions in Cudahy Packing Co. v. Holland, 315 U. S. 357, and Fleming v. Mohawk, 331 U. S. 111, which compels a different result or casts doubt upon the validity of our resolution of this issue. Those cases are not controlling. The Cudahy decision merely held that the Fair Labor Standards Act did not grant the Administrator the power to delegate his subpoena power to subordinates, while on the other hand, the Mohawk case held that the Admin-

istrator of the Emergency Price Control Act was authorized to delegate the authority to issue subpoenas. Each of those cases involved the construction of a statute different from that which concerns us. Accordingly, those decisions, one upholding the delegability of this power and the other denying it, do not govern the instant case.

II. *Delegation of Power to Revoke Subpoenas*

Section 11(1) states in pertinent part that "The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas" and that the person to whom the subpoena is directed "may petition the Board to revoke, and the Board shall revoke, such subpoena" if the evidence sought is not relevant or is not described with sufficient particularity.

The trial examiner, not the Board, denied appellees' petitions to revoke the subpoenas. It was his action which was reviewed by the court below. If he lacked authority to pass on these petitions, then there has been no review of this matter by the proper administrative body. If such be the posture of these proceedings, it was prematture to bring these proceedings before the court below before the proper and duly constituted body had passed on the petitions. Thus, if appellees' position be sustained on this point, the order denying enforcement must be affirmed.

The court below relied solely on the Pesante decision. There it was held that only the Board itself is authorized by Section 11(1) to sit on petitions to revoke subpoenas. The Fifth Circuit in National Labor Relations Board v. Duval Jewelry Co., et al, 243 F. 2d 427, agreed with

the Pesante decision insofar as subpoenas duces tecum are concerned. In respect to subpoenas ad testificandum, the Fifth Circuit held that since Section 11(1) on its face makes no provision as to procedure to test the validity of subpoenas of this type, application for their enforcement cannot be considered premature even if initially reviewed by a trial examiner.[2]

The Seventh Circuit takes a different view. In National Labor Relations Board v. Gunaca, 7 Cir., 230 F. 2d 542, it affirmed, on the opinion below, N. L. R. B. v. Gunaca, 135 F. Supp. 790, a decision upholding the right of a trial examiner to pass on petitions to revoke subpoenas.[3] Both the Court of Appeals and the District Court in the Gunaca case considered the Pesante case, and the considerations therein set forth, and refused to follow. This is also the position taken by then District Judge Medina in National Labor Relations Board v. International Typographical Union, 76 F. Supp. 895. For the reasons hereinafter set forth, we believe that this is the correct view.

The approach taken in the Pesante and Duval cases is that the Act itself bars delegation. We find no such preclusion. Certainly there is no express negation of the power to delegate. The Act sanctions the Board to rule on these petitions; but it does not expressly forbid the Board to delegate this function. Nor do we feel it mandatory to imply such an intent. The Congressional history, though somewhat favorable to appellees' position, is real-

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[2]We need not pass on the validity of this distinction in light of our resolution of this issue.

[3]See also N. L. R. B. v. John S. Barnes Corp., supra.

istically meager and inconclusive.[4] The Act was discussed prolificially in Congress, but the delegability of powers granted by Section 11(1) was not. We concur in Judge Grubb's statements in the Gunaca case, supra, 135 F. Supp. at 794:

> "It would seem to this Court that one should be very slow to presume that the Congress intended to enact a statute which would require a review of testimony possibly two or three thousand miles from the place where the testimony was taken after having it transcribed with all the attendant delays and expense in proceeding before the N. L. R. B. that would be involved. Such construction would make it impossible as a practical matter for the N. L. R. B. to carry out its functions. Certainly they couldn't carry them out expeditiously as Congress no doubt intended. Labor peace or proper labor relations would be sacrificed to innumerable administrative

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[4]The original House Bill, H. R. 3021, provided that a person to whom a subpoena had been directed could "petition the Board, or its duly authorized agent or agents to revoke and the Board, or such agent or agents, shall revoke such subpoena if in its, his, or their opinion, as the case may be, the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its, his, or their opinion, as the case may be, such subpoena does not describe with sufficient particularity the evidence whose production is required." The original Senate Bill, S. 1126, contained no provision dealing with petitions to revoke subpoenas. The Section as finally approved was essentially the House version with the express delegation of power to pass on petitions to revoke subpoenas deleted. Whether this revision was made because it was felt that the added language was superfluous or because Congress doubted the wisdom of granting this power to anyone other than the Board itself, is not disclosed by the Committee or Conference reports or Congressional debates. Taken alone, the change of language, while helpful to appellees, is not persuasive.

> delays . . . . Such construction would put an impossible burden on the Board."

The Court of Appeals approves Judge Grubb's "well reasoned opinion," considers his conclusions sound, and his result correct.

The N. L. R. B. was established to facilitate the peaceful settlement of labor disputes. The practical difficulties in administration which would arise as a consequence of holding that the power to rule on petitions to revoke subpoenas is non-delegable would substantially impede the effectuation of the Board's primary function. Accordingly, it is unreasonable to attribute to Congress an intention to compel such a result.

If the power to delegate has not been withdrawn, as we believe it has not, has it been granted affirmatively?

The Mohawk decision supplies the answer to that question. There, as here, the particular statute in question contained a broad rule-making power. Section 201(d) of the Emergency Price Control Act provided:

> "The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper to carry out the purposes and provisions of this Act."

Addressing itself to the question of whether this Section could be relied upon as a basis for delegating certain functions, the Supreme Court said, 331 U. S. at 121,

> "Such a rule-making power may itself be an adequate source of authority to delegate a particular function, unless by express provision of the Act or by implication it has been withheld. See Plapao Laboratories v. Farley, 67 App. D. C. 304, 92 F. 2d 228."

Section 6 of the Labor-Management Relations Act vests the Board with as much rule-making authority as that possessed by the Administrator under the E. P. C. A. It reads:

> "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter."

Acting pursuant to this authority, the Board promulgated, in Section 102.35 of its Rules and Regulations, the rule that "the trial examiner shall have authority . . . (c) to rule upon petitions to revoke subpoenas."

We hold that this rule of procedure is within the legitimate purview of the Board's power under Section 6 of the Act. The Board, of course, may not enlarge its authority beyond the scope intended by Congress, but the Board, where such restrictive intention is not shown, may adopt rules and regulations to carry out its myriad functions in a manner consistent with the fulfilment of the purposes of the Act. This is exactly what has been done here.

III. *General Counsel As a Party to an Unfair Labor Practice Proceeding.*

We come then to the third question tendered by this appeal. Appellees assert that the General Counsel (or his representative) is not a party to an unfair labor practice proceeding and hence cannot obtain the issuance of subpoenas.

The term "party" is not defined in the Act. The definition contained in the Administrative Procedure Act is not

decisive.[5] Again, we resort to related provisions, and the policies of the Act.

This Court has declared that "in its broadest meaning the word 'party' includes one concerned with, conducting, or taking part in any matter or proceeding, whether he is named or participates as a formal party or not." Fong Sik Leung v. Dulles, 9 Cir., 226 F. 2d 74, 81. Is the General Counsel under the Act a "party" to an unfair labor practice proceeding for purposes of securing the issuance of subpoenas?

The 1947 amendments to the National Labor Relations Act expanded the authority and enhanced the status of the General Counsel in connection with the conduct of unfair labor practice proceedings.

> "By §3(d), supra, the authority formerly exercised by the Board to investigate charges and to issue complaints under §10 was vested in the general counsel. The well-understood purpose of Congress here was to effect a separation of the prosecuting and adjudicating functions within the Board." Haleston Drug Stores v. National Labor Relations Board, 9 Cir., 187 F. 2d 418, 421.

By virtue of §3(d) the General Counsel has "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board." His decision on whether to issue a complaint charging an unfair labor practice is final and

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[5]Section 2(b) of the A. P. A. defines "party" as follows:

"Party includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as as a party, in any agency proceeding."

is not reviewable by either the Board or the courts. Lincourt v. National Labor Relations Board, 1 Cir., 170 F. 2d 306; Hourihan v. National Labor Relations Board, D. C. Cir., 201 F. 2d 187; Anthony v. National Labor Relations Board, 6 Cir., 204 F. 2d 832. If he decides to direct issuance of a complaint, it is his responsibility to prosecute the matter. In this role also he exercises broad powers. International Union, etc. v. National Labor Relations Board, 9 Cir., 231 F. 2d 237, 242. Here then is an official who has life-or-death authority over the initiation of an unfair labor practice proceeding and who, if he determines that such proceedings should be commenced, is entrusted with the task of prosecution. Yet appellees urge that this official lacks authority to apply for the issuance of a subpoena. The argument is untenable.

The Pesante and Duval cases are neither contrary nor apposite. Both involved the question of whether a Regional Director was a party to a representative hearing, as distinguished from an unfair labor practice proceeding.[6] A Regional Director's duties in respect to representative hearings are far different from those the General Counsel performs in connection with unfair labor practice proceedings.

One point remains. It is that counsel for the General Counsel, not the General Counsel himself, sought the

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[6] In Pesante the court held that a Regional Director was not a "party" in a representative hearing within the meaning of Section 11(1) of the Act and therefore was not entitled to the issuance of a subpoena. The Fifth Circuit, in the Duval case, held directly contrary to Pesante and expressly rejected the reasoning in the latter opinion. Of course, we need not decide between the opposing views in the case at bar.

subpoenas. No citation of cases is necessary to restate the rule that in legal contemplation counsel representing counsel occupies the identical legal status of the person he represents. Therefore, if the General Counsel could apply for the issuance of subpoenas, as we have held, counsel representing him could also do so validly.

The order of the District Court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

(Endorsed:) Opinion. Filed October 29, 1957.

Paul P. O'Brien, Clerk.

APPENDIX B.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

National Labor Relations Board, Appellant, vs. D. B. Lewis, President, Lewis Food Company, et al., Appellees.

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is reversed, and that this cause be, and hereby is remanded to the said District Court for further proceedings not inconsistent with the opinion of this court.

(Endorsed:) Judgment. Filed and entered: October 29, 1957.

PAUL P. O'BRIEN, Clerk

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IN THE

Supreme Court of the United States

October Term, 1957
No. 684

D. B. LEWIS, President, Lewis Food Company; HENRY MELLO; MAYNARD (MAC) FOLDEN; GRAMMONT BANVILLE; JOE LOERA; ANASTACIO HOLQUIN; WILLIAM L. (ROY) MILLER; OTTO SCHUBERT; WALTER O. LISSER; and WALTER SCHMIDT, Secretary-Treasurer of Association of Independent Workers of America,

Petitioners,

vs.

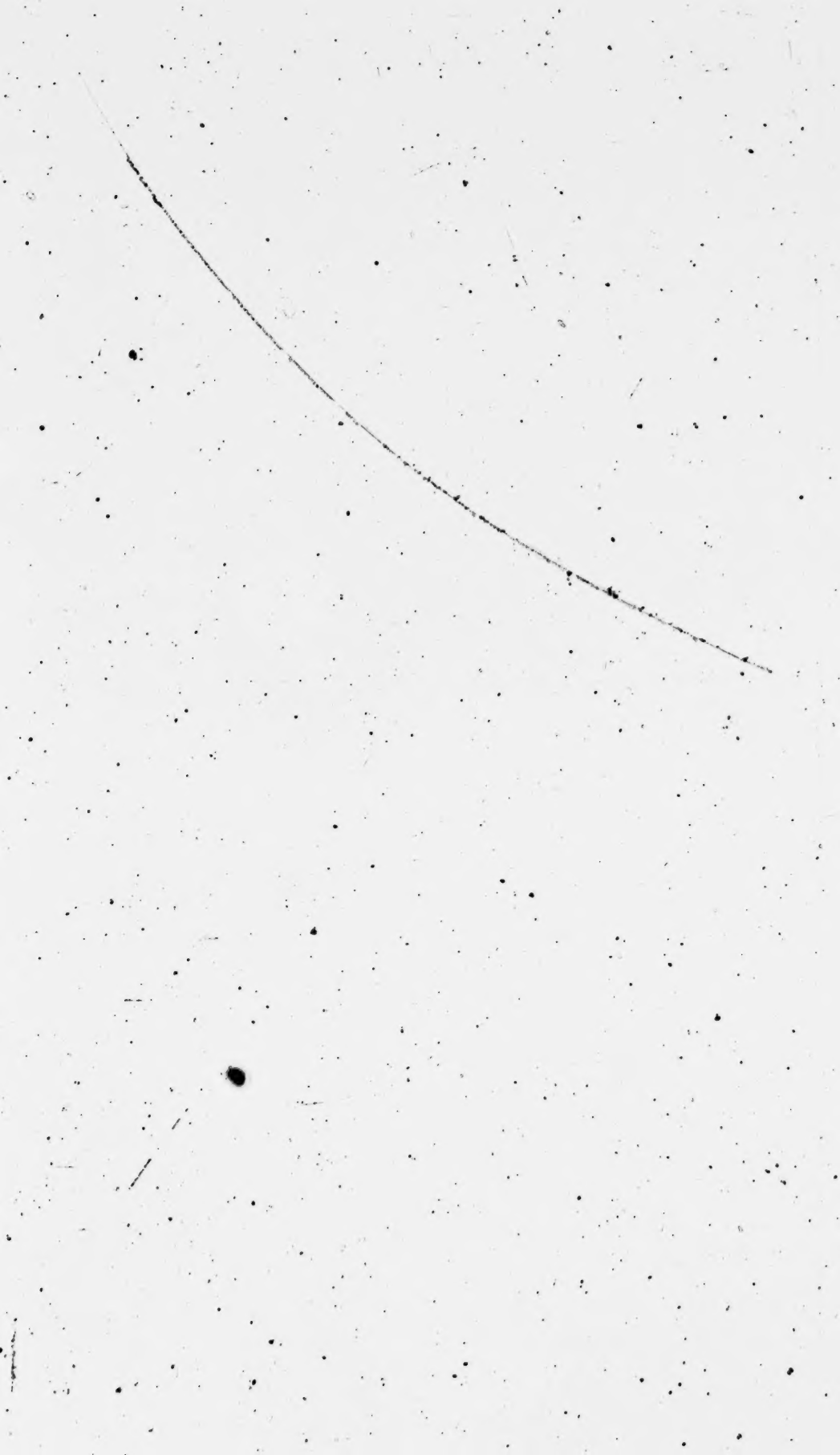
NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

HILL, FARRER & BURRILL,
RAY L. JOHNSON, JR.
WILLIAM H. WILSON,
411 West Fifth Street,
Los Angeles 13, California,
Attorneys for D. B. Lewis, President, Lewis Food Company; Henry Mello; Maynard (Mac) Folden and Grammont Banville



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IN THE

Supreme Court of the United States

October Term, 1957

No. 684

D. B. LEWIS, President, Lewis Food Company; HENRY MELLO; MAYNARD (MAC) FOLDEN; GRAMMONT BANVILLE; JOE LOERA; ANASTACIO HOLQUIN; WILLIAM L. (ROY) MILLER; OTTO SCHUBERT; WALTER O. LISSER; and WALTER SCHMIDT, Secretary-Treasurer of Association of Independent Workers of America,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

Opinions Below.

The Opinion of the court below is officially reported at 249 F. 2d 832. The District Court rendered no opinion. The Order of the District Court is set forth at R. 83-84 ["R." references are to the printed transcript of record].

Jurisdiction.

The judgment of the court below was made and entered on October 29, 1957. The petition for writ of certiorari in this cause was filed December 23, 1957. The Order of this court granting certiorari was made and entered January 27, 1958. The jurisdiction of this court is invoked under 28 U. S. C. 1254.

Statutes, Rules and Regulations Involved.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*) and of the Board's Rules and Regulations (29 C. F. R. 102.1, *et seq.*, Supp. 1956) are set forth *verbatim* in the body of the brief.

Questions Presented.

At the written request of counsel for the General Counsel, the Regional Director of the Board (at Los Angeles) issued certain subpoenas *ad testificandum* and *duces tecum* directed to petitioners under the seal of the Board and under the facsimile signature of Abe Murdock, a member of the Board [R. 30-43]. Petitioners addressed petitions to revoke subpoenas to the National Labor Relations Board and filed said petitions to revoke subpoenas with the Regional Director. The Regional Director referred the petitions to revoke subpoenas to the Trial Examiner, who denied the petitions. Petitioners refused to obey the subpoenas. The Board filed with the District Court an application for an order requiring petitioners to obey the subpoenas. The District Court issued its order quashing the subpoenas. On appeal to the United States Court of Appeals for the Ninth Circuit, the order of the District Court quashing the subpoenas was reversed.

The questions presented are:

(1) Whether the Board has power under the National Labor Relations Act, as amended, to delegate to subordinates the authority to issue subpoenas;

(2) Whether the Board has power under the National Labor Relations Act, as amended, to delegate to subordinates the authority to rule upon petitions to revoke subpoenas;

(3) Whether under the National Labor Relations Act, as amended, and Board Rules and Regulations, a subpoena may be issued upon the application of an attorney employed by the General Counsel of the Board.

Statement.

On April 30, 1956, the General Counsel of the Board issued through the Regional Director of Los Angeles a consolidated complaint against petitioners alleging unfair labor practices in violation of Section 8(a)(1), (2) and (3) of the Act and Section 8(b)(1)(A) and (2) of the Act. The consolidated complaint was issued and served on petitioners, together with a notice that a hearing would be conducted before a Trial Examiner of the Board on the allegations set forth in the complaint [R. 19-26].

On June 1, 4 and 5, 1956, at the request of an attorney for the General Counsel, the Regional Director at Los Angeles issued subpoenas *ad testificandum* and *duces tecum* directed to petitioners under the seal of the Board and under the facsimile signature of Abe Murdock, a member of the Board [R. 30-43].

On June 11, 1956, petitioners addressed petitions to revoke subpoenas to the National Labor Relations Board and filed them with the Regional Director asserting that

(1) the Board could not delegate its power to issue subpoenas to the Regional Director, and (2) an attorney for the General Counsel is not a party to the unfair labor practice proceedings and hence is not entitled to the issuance of subpoenas. As to the *subpoenas duces tecum*, Petitioners Lewis and Schmidt also challenged the relevancy of the records and documents required to be produced [R. 44-51].

On June 11, 1956, the Regional Director referred the petitions to revoke subpoenas to a Trial Examiner who denied the petitions. Petitioners, nevertheless, refused to obey the subpoenas [R. 51-80].

The Board, by its General Counsel, on June 29, 1956, filed with the District Court an application for an order requiring petitioners to obey the subpoenas involved herein [R. 3-9].

Petitioners resisted enforcement of the subpoenas on the grounds that (1) the Regional Director did not have authority to issue the subpoenas; (2) the Trial Examiner did not have authority to rule upon petitioner's petitions to revoke subpoenas; and (3) an attorney for the General Counsel is not entitled to the issuance of subpoenas upon his application, since he is not a party to the proceedings. The objections to the relevancy of the documents and records required to be produced by the subpoenas addressed to Lewis and Schmidt were not renewed.

On July 30, 1956, the District Court issued its order quashing the subpoenas on the authority of *N. L. R. B. v. Pesante*, 119 Fed. Supp. 444 [R. 83-84]. The *Pesante* case held (1) that subpoenas issued under facsimile of a Board member are valid under the Act; (2) however, that the Board must itself pass upon petitions to revoke subpoenas; and (3) that an attorney

for the General Counsel is not a "party" to a Board proceeding and hence neither he nor the attorneys under his supervision may request subpoenas.

On appeal the Court of Appeals reversed the order of the District Court. The Court dealt only briefly with the question of the power of the Board to delegate authority to issue subpoenas, citing *N. L. R. B. v. John S. Barnes Corp.* (7th Cir.), 178 F. 2d 156, where the Court held that a subpoena issued by a Regional Director under the facsimile signature of a Board member is valid.

On the power of the Board to delegate authority to a Trial Examiner to rule on petitions to revoke subpoenas the Court noted that there was a conflict among the Circuits. The *Pesante* case, *supra,* 119 Fed. Supp. 444, and *N. L. R. B. v. Duval Jewelry Co.* (5th Cir.), 243 F. 2d 427, certiorari granted in the United States Supreme Court, October Term, 1957, No. 234, hold that only the Board itself is authorized by Section 11(1) to hear petitions to revoke subpoenas; on the other hand, the Seventh Circuit takes a different view in *N. L. R. B. v. Gunaca,* 230 F. 2d 542. The Seventh Circuit decision is in accord with the decision in *N. L. R. B. v. International Typographical Union,* 76 Fed. Supp. 895. The Ninth Circuit followed the decision of the Seventh Circuit in the *Gunaca* case, *supra,* 230 F. 2d 542.

The Ninth Circuit Court agrees with petitioners that the statute itself and the legislative history are "somewhat favorable to appellees' [petitioners'] position." However, under a "rule of convenience" the Ninth Circuit finds that a holding that the power to rule on petitions to revoke subpoenas is non-delegable "would substantially impede the effectuation of the Board's primary function." The Court concludes that, since the power to delegate has not been

expressly or impliedly withdrawn under the statute, the Board under its rule-making authority (Sec. 6 of the Act) has the power to make a rule delegating authority to a Trial Examiner to pass upon petitions to revoke subpoenas.

Finally, the Ninth Circuit held that the General Counsel is a party to an unfair labor practice proceeding relying primarily on Section 3(d) of the Act, which gives the General Counsel "final authority on behalf of the Board in respect of the investigation of charges and issuance of the complaints under Section 10, and in respect of the prosecution of such complaints before the Board." The Court distinguished the *Pesante* case, *supra*, which held that a Regional Director of the Board is not a party to a representation proceeding. The Ninth Circuit did not discuss the effect of Section 102.8 of the Board's Rules and Regulations, which does not include General Counsel within the definition of "party."

Summary of Argument.

The terms of Section 11 of the National Labor Relations Act itself demonstrate conclusively that the subpoena power is not delegable. Any person who reads Section 11(1) of the Act must conclude that, without reference to the legislative history, the cases, or other aids to construction, Congress specifically provided for delegation of the subpoena power by the Board when it intended such delegation and omitted the power to delegate when it intended that the Board, or a member thereof, should not delegate. The statute is clear. The Court should not go outside the statute to construe it.

In addition to the clear language of the statute, the legislative history of the Act shows that Congress intended that the power to issue and revoke subpoenas could not be delegated. The original bill, as passed in the House, permitted delegation of the subpoena power. The Senate Bill did not. Section 11(1) of the Act, as finally adopted, is a compromise between the House and Senate versions. The House provision for automatic issuance of subpoenas plus the power to revoke was adopted, but the language of the House version regarding delegation of the subpoena power to a "trial examiner" in the case of issuance of a subpoena and the delegation to "duly authorized agent or agents" in the case of revocation of the subpoena was omitted. The change in language between the original House version and the final statute must lead to the conclusion that Congress did not intend to permit delegation with respect to the power of issuing and revoking subpoenas.

The decision of this Court on the subject of delegation of subpoena power uphold the position of Petitioners. The present case is almost identical to the *Cudahy* case, 315 U. S. 357, and differs substantially from the *Mohawk* case, 331 U. S. 111. A consideration of the five points made by this Court in the *Mohawk* case point to the same conclusion that was reached in the *Cudahy* case, to wit, the subpoena power is not delegable.

The Seventh Circuit decisions in the *Barnes* case, 178 F. 2d 156 and the *Gunaca* case, 230 F. 2d 542, are the decisions relied upon by the court below and the Fifth Circuit in reaching the conclusion that the subpoena power

can be delegated. The decisions of the Seventh Circuit are followed without independent examination of the question. An analysis of the Seventh Circuit decisions discloses that the decisions are wrong, both on principle and precedent. The Seventh and Ninth Circuits have misinterpreted Section 5 when they hold that power of inquiry includes the power to issue subpoenas. The courts have greatly overemphasized Section 6—the rule-making power—and have disregarded the language of the *Mohawk* case in this regard. The Court's argument for flexibility of administration and ease of issuance and revoking subpoenas completely under-emphasizes the importance of the subpoena power and the need to protect individual rights. The courts' attempt to distinguish the *Cudahy* case and reliance on the *Mohawk* case are in complete disregard of the actual decision in the *Mohawk* case.

Finally, we contend that the subpoenas are invalid because they were issued without a proper application therefor. The application was made by an individual who was not a party to the proceedings, contrary to the language of Section 11(d) of the Act, contrary to the language of Section 2(b) of the Administrative Procedure Act and contrary to the Board's own rules and regulations which define the term "party" in Section 102.8. The application for subpoenas was made by an attorney for the General Counsel and such an individual is not a party under the provisions of the statute or rules and regulations of the Board.

In view of the foregoing, this Court should hold that the subpoena power is not delegable, that the subpoenas are void and the case should be remanded to the District Court with directions to quash the subpoena forthwith.

ARGUMENT.

I.

Section 11 of the National Labor Relations Act, as Amended, Shows on Its Face That the Subpoena Power Is Not Delegable.

We contend that the terms of the Act itself demonstrate conclusively that the subpoena power is not delegable. We further contend that the legislative history of the Act and the cases in point also support this view.

Section 11 of the Act provides with respect to the subpoena power as follows:

> "Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—
>
> "(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such

subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agencies designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing."

The Court will note that there are five sentences in subsection (1) of Section 11. The fifth sentence can be disregarded for present purposes. The Court's attention is called to a comparison of the first and fourth sentences as against the second and third sentences.

The first sentence, in providing for the examination of evidence and the right to copy evidence, gives the power to the Board "or its duly authorized agents or agencies" —a clear authority to delegate that power.

The fourth sentence, in providing for the administering of oaths, examination of witnesses and the receiving of evidence, also vests the power in any member of the Board "or any agent or agency designated by the Board for such purposes." Here again the authority given to the Board may be delegated.

On the other hand, the second sentence which provides for the issuance of subpoenas, gives the power only to "The Board, or any member thereof." In the third sentence which provides for revocation of the subpoena, the power is given to "the Board."

The Ninth Circuit Court held below that there is no expressed or implied negation of the power to delegate in the Act. This is contrary to the approach taken in the *Pesante* case, *supra*, 119 Fed. Supp. 444, and the *Duval* case, *supra*, 243 F. 2d 427, where the courts found that the Act itself bars delegation.

It is submitted that any person who reads Section 11 (1) must conclude without reference to the legislative history, cases or other aids to construction, that Congress specifically provided for delegation by the Board when it intended such delegation and omitted the power to delegate when it intended that the Board, or a member thereof, should not delegate. If a statute is clear, the Court need not go outside the statute to construe it.

II.

The Legislative History of the National Labor Relations Act Shows That the Subpoena Power Is Not Delegable.

In addition to the clear language of the statute, the legislative history of the Act establishes that Congress intended that the power to issue subpoenas and to revoke subpoenas could not be delegated. References hereafter are to "Legislative History of the Labor Management Relations Act, 1947, Vol. I (National Labor Relations Board, 1948)."

The first step in the legislative process was H. R. 3020, as reported by the Committee on Education and Labor and as is passed the House of Representatives initially. (Legislative History, *op. cit.*, pp. 74, 201.) This version provided as follows:

> "Sec. 11. For the purpose of any proceeding before the Board, or before a member, examiner, or examiners thereof, or for the purpose of any investigation by the Administrator under section 9—
>
> "(1). The Board, or any member thereof, *or any trial examiner* shall, upon application of the Administrator or any party to such proceedings, forthwith issue to the Administrator or to such party as the case may be, in the name of the Board, subpoenas

requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence or under his control, such person may petition the Board, *or its duly authorized agent or agents,* to revoke and the Board, *or such agent or agents,* shall revoke such subpoena if in its, *his or their* opinion, as the case may be, the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its, *his or their* opinion, as the case may be such subpoena does not describe with sufficient particularity the evidence whose production is required. The Administrator, or any member of the Board, *or any examiner or examiners designated by the Board for such purposes,* may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing." (Emphasis added.)

The language which should be noted particularly is italized.

The original Senate version, S. 1126, as reported by the Committee on Labor and Public Welfare and H. R. 3020 as it passed the Senate initially, both provided as follows (Legislative History, *op. cit.,* pp. 133, 261):

"Sect. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

"(1) The Board, or its duly authorized agents or agencies, shall, at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any persons being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent or agency conducting the hearing or investigation. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing."

The Court will note that the Senate Bill contained language entirely different from the House Bill.

Section 11(1) of the Act, as finally adopted (29 U. S. C. A. (Supp.), Sec. 161), is a compromise between the House and the Senate versions. The House provision for an automatic issuance of a subpoena plus the power to revoke was adopted, but the language of the House version regarding delegation of the subpoena power to a "trial examiner" (in the case of issuance of the subpoena) and the delegation to "duly authorized agent or agents" (in the case of revocation of the subpoena) was omitted. In addition, the Senate version was changed to permit the Board to issue subpoenas as well as "any member of the Board."

With reference to the legislative history, the Ninth Circuit recognizes that Congressional action was "favorable" to petitioners' position but "inconclusive." Having made the statement, the Court then drops its discussion of Congressional history and applies what we prefer to call a "rule of convenience", finding that it would make it extremely difficult, as a practical matter, for the Board to carry out its functions, if it did not have the power to delegate the subpoena power. In our view, the Seventh and Ninth Circuits are engaging in judicial legislation and have failed to uphold the statute as written.

We submit that the change in language between the original House version and the final statute must lead to the conclusion that the Congress intended to permit delegation with respect to the powers granted in the first and fourth sentences of Section 11(1), but did not intend to permit delegation with respect to the power of issuing and revoking subpoenas contained in the second and third sentences.

The Ninth Circuit Court upheld the Board's delegation of power to revoke subpoenas under the rule-making power vested in the Board by virtue of Section 6 of the Act. An agency rule can not change positive provisions of the statute. The rule-making power can not serve as a source of delegation where the statute expressly, or by implication, withholds such power. *Fleming v. Mohawk Company, supra,* 331 U. S. 111, 121. We submit that the Act and the legislative history thereof clearly indicate that Congress intended that the Board itself exercise the subpoena power and that such power can not be delegated by rule, or otherwise.

III.

The Decisions of This Court Show That the Subpoena Power Is Not Delegable.

This Court has expressed itself on the subject of delegation of the subpoena power in *Cudahy Packing Co. v. Holland*, 315 U. S. 357 and *Fleming v. Mohawk Wrecking and Lumber Co.*, 331 U. S. 111. The Ninth Circuit Court held that these cases are not controlling, since they involved construction of a statute different from the National Labor Relations Act. The statute under construction in the *Cudahy* case, *supra*, 315 U. S. 357, is almost exactly the same as Section 11 of the National Labor Relations Act. We contend that the principles enunciated in the *Cudahy* case, *supra*, 315 U. S. 357, and the *Mohawk* case, *supra*, 331 U. S. 111, are controlling and that a comparison of the two cases will show that the present case is governed by the *Cudahy* case.

The *Cudahy* case held that the Administrator of the Fair Labor Standards Act did *not* have the power to delegate to his subordinates the authority to issue subpoenas. This Court said in part:

> "The entire history of the legislation controlling the use of subpoenas by administrative officers indicates a Congressional purpose not to authorize by implication the delegation of the subpoena power."

The *Mohawk* case held that the Administrator of the Emergency Price Control Act *was* authorized to delegate to district directors authority to issue subpoenas. This Court, in the *Mohawk* case, approved the *Cudahy* case but held that the *Cudahy* case did not apply to the facts of the *Mohawk* case because of five points discussed in the opinion. Since the *Mohawk* case is later in point of time, and since it distinguishes the *Cudahy* case, we wish

to discuss this Court's reasoning in the *Mohawk* case step by step.

The first point made by this Court in the *Mohawk* case (331 U. S. 111, 120) was that the legislative history of the Fair Labor Standards Act involved in the *Cudahy* case showed that a provision granting authority to delegate the subpoena power had been eliminated when the bill was in Conference. On the other hand, this Court pointed out that the legislative history of the Emergency Price Control Act showed that the Senate Committee report on the bill had stated specifically that the Administrator could delegate any of the powers given to him by such bill. Thus, there are two points of difference in the legislative history of the statutes considered in *Cudahy* and *Mohawk*.

It is apparent that the present case is almost identical with the *Cudahy* situation and is entirely different from the *Mohawk* case. We have already pointed out that the House bill provided for delegation of the subpoena power but that in Conference this provision was eliminated. In the second place, there is nothing in any of the committee reports or in the discussion on the floor of Congress which indicates that the subpoena power can be delegated. Therefore, on the first point of the *Mohawk* opinion, it is clear that the *Cudahy* case controls the present case.

The second point made by this Court in the *Mohawk* case (331 U. S. 111, 121) is that the Fair Labor Standards Act involved in the *Cudahy* decision expressly made delegable the power to gather data and make investigations, this Court in the *Mohawk* case stating that this lends "support to the view that when Congress desired to give authority to delegate, it said so expressly." On the other hand, the Emergency Price Control Act did not

contain a provision specifically authorizing delegation of other functions.

Compare the present Act on this point. Like the Fair Labor Standards Act, the present Act expressly grants the power to delegate in several specific areas. First, Section 3(b) authorizes the Board to delegate any of its powers to any group of three or more of its members. Second, Section 5 provides that the Board may delegate the power to prosecute an inquiry necessary to its functions. Third, Section 11(1) provides that the Board's power to examine evidence can be delegated to its agents or agencies. Finally, Section 11(1) provides that the power to administer oaths, examine witnesses and receive evidence can be delegated to the Board's agents or agencies. Therefore, the principle relied upon by the Court in the *Mohawk* case to support the *Cudahy* result, is applicable to the present case even more so than it was in the *Cudahy* case. Obviously, on this second point of argument, the *Cudahy* case should be followed here.

The third point of this Court in the *Mohawk* case (331 U. S. 111, 121) is that the Fair Labor Standards Act in the *Cudahy* case incorporated by reference certain sections of the Federal Trade Commission Act, whereas the Emergency Price Control Act contained its own description of the subpoena power.

Again, compare the present Act. This Act does not incorporate the provisions of the Federal Trade Commission Act by reference *but in fact copies portions of the Federal Trade Commission Act almost verbatim.* This point appears clearly from a comparison of the pertinent provisions of the three Acts, the Emergency Price Control Act, the Federal Trade Commission Act, and the present Act.

Emergency Price Control Act:

"The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena, require any such person to appear and testify or to appear and produce documents, or both, at any designated place." (Section 202 of the Act; 50 U. S. C. A. App. Sec. 922)

Federal Trade Commission Act:

"For the purposes of sections 41-46 and 47-58 of this title the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence."

National Labor Relations Act;

Section 11 is quoted in full at pages 9-10 of this Brief.

It is apparent that the language of the present Act is almost exactly the same as that of the Federal Trade Commission Act except that the present Act adds the power to revoke and except that there are natural variations of language due to the different types of operations involved. Also, although we have not set forth the material here, the Court will note that the language used in the Federal Trade Commission Act regarding enforcement of subpoenas, taking of depositions, and immunity of witnesses (15 U. S. C. A. Sec. 49), is almost identical with

subdivisions (2) and (3) of Section 11 of the present Act. We therefore believe that the *Cudahy* case on this ground is clearly applicable to the present case.

The fourth point made by this Court in the *Mohawk* case (331 U. S. 111, 121) is that the Emergency Price Control Act gave the Administrator specific power to issue rules and regulations, whereas the Fair Labor Standards Act did not do so. Without more, the present Act would thus be more like the Emergency Price Control Act because Section 6 of the present Act does give the Board power to issue rules and regulations. However, it should also be noted that this Court in the *Mohawk* case states that the rule making power may give authority to delegate a particular function "unless by express provision of the Act or *by implication*, it has been withheld" (331 U. S. 111, 121) (emphasis added). We have already shown that the first three points relied upon by this Court in the *Mohawk* case prove that the present Act has, by implication, clearly withheld the power to delegate the subpoena authority. Therefore, as this Court in the *Mohawk* case recognized, the mere existence of the rule-making power is not enough to overcome the other factors.

The fifth point mentioned by this Court in the *Mohawk* case as more or less an afterthought, is that the Emergency Price Control Act set up a program which was very broad and extensive—"probably the most comprehensive legal control over the economy ever attemped" (331 U. S. 111, 122)—and that the Administrator of that statute would have had difficulty performing personally all of the investigative functions given to him. The National Labor Relations Board has broad powers and a good deal of work, but it is obvious that its job in handling labor cases is much less extensive than the work performed under the Emergency Price Control Act.

It is, of course, true that if the National Labor Relations Board followed the plain and simple dictates of the Act and subpoenas were issued by the Board or members of the Board, the members would have more work than if they merely signed a stack of subpoenas in blank and did not have to rule upon petitions to revoke subpoenas. But there is good reason why that should be so. The *Cudahy* case stated the principle very well in answer to the argument that it would be hard for the Administrator of the Fair Labor Standards Act to handle the subpoena power personally (315 U. S. 357, 363):

> "The Administrator . . . points to the wide range of duties imposed upon him, the vast extent of his territorial jurisdiction, and the large number of investigations required for the enforcement of the Act. From this he argues that Congress must have intended that he should be permitted to delegate his authority to sign and issue subpoenas. But this argument loses force when examined in the light of related provisions of the Act and of the actual course of Congressional legislation in this field.
>
> "Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer."

As already stated, the Board relies upon the *Mohawk* case; we rely upon the *Cudahy* case. In light of the five points made by this Court in the *Mohawk* case, we think the conclusion is inescapable that every factor points to the conclusion reached in the *Cudahy* case—the subpoena power is not delegable.

IV.

The Seventh Circuit Decisions Upon Which the Ninth Circuit Relied, and Which Uphold the Authority of the Board to Delegate the Subpoena Powers Are Demonstrably Wrong.

Since the decision of the Court of Appeals of the Seventh Circuit in *N. L. R. B. v. John S. Barnes Corp.*, 178 F. 2d 156, is the decision upon which the courts in other circuits have relied in upholding the authority to delegate the subpoena power, we propose to discuss the *Barnes* case, *supra*, in detail. The *Barnes* case was followed by the Fifth Circuit without any regard to discussion of the point in *J. B. Edwards v. N. L. R. B.*, 189 F. 2d 970, and in *Jackson Packing Co. v. N. L. R. B.*, 204 F. 2d 842. The *Barnes* case, *supra*, was followed by the Seventh Circuit in a later decision in *N. L. R. B. v. Gunaca*, 230 F. 2d 542, which upheld the power of Trial Examiners to rule on petitions to revoke. The Ninth Circuit in the instant case also followed the *Barnes* and *Gunaca* decisions, *supra*, without discussion. The case is relied on heavily by the Board. Since we believe this Court should reach a conclusion contrary to the philosophy and reasoning of the *Barnes* case, we wish to discuss that case point by point.

The Court, in the *Barnes* case, first stated (178 F. 2d 156, 158) that if the language of Section 11 were the only thing to consider, the Court would be "inclined to agree" that the Board has no power to delegate. In our opinion, this is the only correct point made by the *Barnes* case.

In the second place the Court stated (178 F. 2d 156, 159) that the mere fact that certain sections of the Act give authority to delegate does not deprive the Board of the power to delegate other functions. This statement is

much too broad, since the question obviously depends upon the nature of the power which is given expressly and the nature of the power which is attempted to be implied. Also, the statement, as applied to the present situation, is in direct conflict with the decision of this Court in the *Cudahy* case and the view expressed by this Court in the *Mohawk* case as part of its discussion of the *Cudahy* case.

An example which is given by the court in the *Barnes* case of the statement noted above is indicative of the loose reasoning throughout the case. The Court says that Section 9(c)(1) provides that "the Board" shall investigate representation petitions, whereas, the Board actually authorizes its subordinates to investigate. The court then says that no one doubts the authority of the Board to delegate to subordinates the performance of such a function, even though the delegation is not expressly authorized by the Act (178 F. 2d 156, 159). Apparently, the Court assumes that the power to delegate the investigation of representation petitions is implied. Actually, as already noted, Section 5 of the Act provides that the "Board may by one or more of its members or by such agents or agencies as it may designate, pursue any inquiry necessary to its functions in any part of the United States." Section 11(1) states that the Board may delegate the power to examine evidence. This section also provides that the Board may delegate the authority to examine witnesses and to receive evidence.

In view of Section 5 and Section 11(1), it is apparent that the authority to delegate the power to investigate representation petitions is expressly given to the Board and is not, as the *Barnes* case states, to be implied.

The third point made by the court in the *Barnes* case (178 F. 2d 156, 159) is that Section 5, which, as noted

above, gives authority to "prosecute any inquiry", includes the power to issue subpoenas. This is the equivalent of saying that because the Department of Justice can investigate possible violations of law or inquiry into such violations, the Department of Justice can issue subpoenas. Also, Section 5 gives the Board authority to make inquiries and if, as the *Barnes* case states, Section 5 includes the power to issue subpoenas, Section 11 would be superfluous. The fact is that Section 11 was obviously intended to cover the subpoena power specifically and Section 5 certainly was not so intended. We submit that the power to delegate as given in Section 5 regarding inquiries, not only does *not* give the power to delegate the issuance of subpoenas, but actually negates any such implication in Section 11, as the *Mohawk* case points out (331 U. S. 111, 121).

The fourth point of the court in the *Barnes* case (178 F. 2d 156, 159) is that Section 6—the rule-making power—permits the Board to adopt a regulation authorizing a Regional Director or a Hearing Officer to issue subpoenas. Here again, the court in the *Barnes* case, although it quotes the *Mohawk* case, fails to note that the court in the latter case specifically stated that the rule-making power cannot served as a source of delegation where the statute *by implication* withholds such power (331 U. S. 111, 121). We submit that in view of the other factors already noted, the reliance of the court in the *Barnes* case on the rule-making power is entirely unjustified.

The fifth point of the *Barnes* case (178 F. 2d 156, 160) is that "the administration of the Act must be flexible", and if the Board or a member of the Board were required to follow the terms of the statute and to issue the subpoena, the application for the subpoena would have to go

to Washington and it would not be as easy or convenient for parties to obtain subpoenas. We submit that this is further evidence of the loose thinking of a type which has caused some courts to give administrative agencies powers which were never intended by Congress, and which has permitted the bureaucratic processes to usurp functions which traditionally and properly should be reserved to the courts. Despite the *Barnes* case, we believe that the power to issue subpoenas is not analogous to the power of inquiry. It is a power which should not be given lightly. (*Cudahy* case, 315 U. S. 357, 363.)

If, as appears from the statute itself, as the court in the *Barnes* case admits, and as appears from the legislative history, the statute provides that the Board or members of the Board shall issue the subpoenas, what sort of an argument is it which justifies delegation on the basis of convenience. Members of the Board are appointed by the President with the advice and consent of the Senate. (Section 3(a) of the Act). Presumably, the Board is a responsible agency and Congress apparently believed that when the very important subpoena power is given to an administrative agency, convenience is secondary to the fact that responsible persons must exercise the power—not merely any person who might be picked out by the Board. Essentially, the question on this point raised by the *Barnes* case depends upon the importance attached to the subpoena power. The court in the *Barnes* case apparently regards this power as relatively unimportant.

The same sort of argument is made by the court in the next, the sixth point, of the *Barnes* case (178 F. 2d 156, 160). The court says that if the power to issue the subpoena is not delegable, the power to revoke the subpoena likewise is not delegable. That conclusion is exactly correct and is exactly what Section 11(1) says. The court

then states that every petition to revoke would have to be passed upon by at least three members of the Board, which would take so much time that the Board could not perform its other "more important duties."

Again, we submit this shows the lack of importance attached to the subpoena power by the court. We think that the Board can have no more important power than that of using the power of the United States to force the production of evidence by subpoenas. The *Pesante* case, *supra*, 119 Fed. Supp. 444, is a good illustration of the effect of thinking such as that of the Court in the *Barnes* case. In the *Pesante* case, the Regional Director issued twenty-nine *subpoenas duces tecum* directed to twenty-nine companies, in most cases improperly described, mailed the subpoenas to addresses, which in many cases were erroneous, directing the twenty-nine companies to appear at the offices of the National Labor Relations Board in Los Angeles at the same time and place with records and documents so voluminous as, in most cases, would have required a small truck. Some of these companies were located from 300 to 400 miles from the offices of the National Labor Relations Board in Los Angeles. These subpoenas were issued solely to permit an agent of the Board to examine the books and records at his convenience for the purpose of determining whether or not the Board would take jurisdiction of the case. Perhaps if the Board, or a member of the Board, had been responsible for the issuance of the subpoenas, as the statute requires, the processes of the United States would not have been so abused; at least the persons subpoenaed could have petitioned for revocation of subpoenas to the Board with more hope of a responsible determination.

The seventh point of the *Barnes* case (178 F. 2d 156, 160) is that the National Labor Relations Board had

followed the practice of having subpoenas signed in blank and had delegated the power to issue subpoenas as early as 1941, that Congress must have been aware of this practice, and that Congress by amending Section 11 by the Labor Management Relations Act of 1947, impliedly approved the practice of the Board.

There are several answers to this argument. The first is that the rule stated by the court applies only where the statute is ambiguous. An administrative agency cannot expand its powers under a statute by an administrative practice no matter how many times Congress acts to re-enact or to amend such a statute.

The second answer is that when Congress, by action of the Conference Committee, deleted the authority to delegate the power to issue subpoenas as such power was originally set forth in the House Bill, H. R. 3020, and likewise deleted the authority to delegate the power to revoke subpoenas as originally contained in the same Bill, it is certainly clear that Congress did not intend the Board or its members to delegate either issuance or revocation. Whether or not Congress actually knew of the prior practice of the Board, we cannot say, but certainly the language and the legislative history indicate that Congress did not intend to approve any such administrative practice. Presumably, Congress did not feel the need to say to the Board "You cannot delegate", when the language was so clear. Furthermore, as the *Barnes* case points out, Section 11 was changed substantially by the 1947 amendment. Therefore, the argument of implied ratification by Congress of the Board's practice, is not applicable.

A third answer might be that Congress was aware of the *Cudahy* decision (1942) holding that the subpoena power under the Federal Trade Commission Act could *not*

be delegated, and that by adopting language in Section 11 of the present Act so similar to that of the Federal Trade Commission Act (15 U. S. C. A. Sec. 49), Congress, in 1947, impliedly ratified the *Cudahy* decision.

The eighth point of the *Barnes* case (178 F. 2d 156, 161) is that the action of the Board or one of its members in issuing a subpoena is only ministerial, whereas the action of the administrative agency in the *Cudahy* case was discretionary. We submit that when the issuance of the subpoena was made automatic, with the power of revocation, the Congress might well have considered that this would make it even more important to have the power vested in responsible persons, such as the Board or its members, rather than in unknown subordinates. Also, it should be noted that the agency issuing the subpoena must determine (a) whether there is a proceeding pending such as described in Section 11(1) and (b) whether the applicant is a bona fide party to the proceeding. This action is not ministerial. Also, the power to revoke obviously involves an additional amount of discretion, yet on the theory of the *Barnes* case, the power of revocation can also be delegated to any agent the Board wishes to designate. We submit that the issuance of subpoenas is not ministerial, but, in any event, we believe that the history of the protection of individual rights in this country, shows that the subpoena power is more important than the court in the *Barnes* case considers and that administrative agencies should not be given the power lightly.

The ninth point of the case (178 F. 2d 156, 161) is that the *Cudahy* case is not in point because of several factors. First, the court says, in effect, that Section 4 (c) of the Fair Labor Standards Act is not as broad from the stand-

point of delegation as Section 5 of the present Act. Section 4(c) of the Fair Labor Standards Act provides:

> "The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place." (29 U. S. C. A. Sec. 204(c).)

Section 5 of the present Act, as already mentioned above, provides that:

> "The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States . . ."

We submit that the distinction between Section 4(c) and Section 5 is a very weak argument for distinguishing the *Cudahy* case.

The Court also says that in the *Cudahy* case the Supreme Court emphasized that a provision authorizing delegation of the subpoena power had been eliminated when the Bill was in Congress. If the court in the *Barnes* case had inquired, it might have discovered that a provision authorizing delegation was eliminated from the House Bill in the Conference Committee when the present Act was being adopted.

The *Barnes* case also states that in the *Cudahy* case the Supreme Court had stated that such court was not then concerned with the practice of some of the agencies, including the National Labor Relations Board, of delegating the issuance, though not the signing, to subordinates. Does the court in the *Barnes* case mean by this statement

that if, in the *Cudahy* case, the subpoenas had been rubber-stamped in blank and given to subordinates to issue, as done by the National Labor Relations Board, that this Court in the *Cudahy* case would then have approved such issuance of the subpoenas? Such a position seems to be rather silly and not really worth argument. As a matter of fact, the whole point of the *Barnes* case, up to this stage, is that the National Labor Relations Board *has* delegated the issuance of subpoenas. Its reference to the quotation from the *Cudahy* case is meaningless.

The tenth and last point of the *Barnes* case (178 F. 2d 156, 162) is that the *Mohawk* case is the most recent one involving this delegation problem, and the *Barnes* case says:

> "All of the reasons assigned by the Supreme Court for sustaining the validity of the delegation of the subpoena power in the Mohawk case, apply to the instant case, except that the Act here did make expressly delegable certain powers other than the power to issue subpoenas."

If further evidence of the weakness of the *Barnes* decision were needed, it is provided in this final comment. The fact is that the points relied upon by the Supreme Court in the *Mohawk* case, every point but one leads to the conclusion that the *Cudahy* case applies here. The only point as to which the *Mohawk* case is similar to the present case is that in both the Emergency Price Control Act and the present Act, the administrative agency has the rule-making power. And, as the Court in the *Mohawk* case specifically stated, although this was disregarded in the *Barnes* case, the rule-making power cannot be relied upon for authority to delegate where Congress, by implication, has withheld such authority.

We submit that the argument of the Court in the *Barnes* case is replete with inaccuracies, inconsistencies and error. The Court (1) has overlooked Section 5 in the Court's reliance on Section 9(c)(1); (2) the Court has misinterpreted Section 5, when it says that power includes the power to issue subpoenas; (3) the Court has greatly overemphasized Section 6—the rule-making power—and has disregarded the language of the *Mohawk* case in this respect; (4) the Court's argument for flexibility of administration and ease of issuing and revoking subpoenas completely overlooks the importance of the subpoena power and the great need that such power be exercised by a responsible agency and not by every Tom, Dick and Harry, if individual rights are to be protected; (5) the Court's reliance upon the administrative practice prior to 1947 is clearly in error where the Act itself is specific, where Section 11 was revised, and where in conference the delegation provisions were eliminated; (6) the Court's attempt to distinguish the *Cudahy* case and the Court's reliance on the *Mohawk* case are in complete disregard of the actual decision in the *Mohawk* case.

We suppose it is obvious by now that we believe the *Barnes* decision to be one of the most superficial and poorly reasoned decisions to be handed down by a Court of Appeals. The two cases relied upon by the Board from the Fifth Circuit—the *Edwards* case and the *Jackson Packing* case, *supra*, are meaningless, since the Court in those cases blindly relied upon the *Barnes* case without any analysis of the problem. We therefore submit that any true examination of this question can result in only one conclusion—the *Cudahy* case, as interpreted by the *Mohawk* case, is clearly applicable here and the *Barnes* case, and the cases following it, are clearly wrong.

V.

The Subpoenas Are Invalid Because They Were Issued Without a Proper Application Therefor.

Finally, we contend that the subpoenas here involved are invalid because they were issued without a proper application therefor. Section 11(d) of the Act provides that a subpoena shall be issued "upon application of any party to such proceedings." The term "party" is not defined in the Act. Section 2(b) of the Administrative Procedure Act defines "party" as follows:

> "'Party' includes any person or agency named or admitted as a party, or properly acting and entitled as of right to be admitted as a party, in any agency proceeding."

Section 6 of the Administrative Procedure Act provides:

> "Agency subpoenas authorized by law shall be issued to any *party* upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought." (Emphasis added.)

It is clear that under the Administrative Procedure Act the General Counsel and counsel for the General Counsel are not parties to this proceeding since they have not been named or admitted as a party.

Section 102.58(c) of the Board's Rules and Regulations provides that a subpoena shall be issued "upon application . . . in writing by any party." Section 102.8 of the Board's Rules and Regulations provides:

> "The term 'party' as used herein shall mean the regional director in whose region the proceeding is pending, and any person named or admitted as a party, or properly acting and entitled as of right to be admitted as a party. . . ."

The Ninth Circuit Court failed completely to discuss the effect of the Board's own Rules and Regulations which defined the term "party." With reference to the definition contained in the Administrative Procedure Act, the Court below said that the definition "is not decisive."

Under the Board's own definition of "party," as set forth above, it is apparent that the applications for the subpoenas were not made by a "party" as required by the Act and by the regulations. The application for every subpoena was made by E. Don Wilson, described in the subpoenas as "counsel for the General Counsel."

The Ninth Circuit Court found that the General Counsel is a party to an unfair labor practice proceeding under the authority of Section 3(d) of the Act and the Ninth Circuit Court's definition of "party," as including any one taking part in a proceeding. (*Fong Sik Leun v. Dulles*, 226 F. 2d 74, 81.)

The usual legal definition of a "party" certainly does not include an attorney (as such). The generally accepted definition of "party" is entirely at odds with the view that the General Counsel, or his attorney, who are representatives and employees of the Board, are parties. There is no basis for a construction of the word "party" to include persons directly associated with the agency before whom both sides (unions and management) in an adversary proceeding are submitting, or are about to submit, their causes. In the *Pesante* case, *supra*, 119 Fed. Supp. 444, the District Court stated that in its opinion Congress by the Act and the Board by its regulations intended to, and did, leave it up to the adversaries (union and management) to apply for subpoenas.

We contend that the General Counsel is no more a party to this proceeding than would be the Solicitor General in a proceeding brought on behalf of the United States Government. The General Counsel is not a party as defined in the Administrative Procedure Act or the Board regulations. It follows that the subpoenas are invalid because they were issued without a proper application therefor.

Conclusion.

For the foregoing reasons, the judgment of the Court below should be reversed and the case remanded to the District Court with directions to quash the subpoenas forthwith.

WILLIAM M. FARRER, and
RAY L. JOHNSON, JR., for
HILL, FARRER & BURRILL,
WILLIAM H. WILSON,
Attorneys for D. B. Lewis, President, Lewis Food Company; Henry Mello; Maynard (Mac) Folden and Grammont Banville.

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IN THE

Supreme Court of the United States

October Term, 1957.
No. 684

D. B. LEWIS, President, Lewis Food Company; HENRY MELLO; MAYNARD (MAC) FOLDEN; GRAMMONT BANVILLE; JOE LOERA, ANASTACIO HOLQUIN; WILLIAM L. (ROY) MILLER; OTTO SCHUBERT; WALTER O. LISSER; and WALTER SCHMIDT, Secretary-Treasurer, of Association of Independent Workers of America,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR CERTAIN PETITIONERS.

HILL, FARRER & BURRILL,
RAY L. JOHNSON, JR.
WILLIAM H. WILSON,
411 West Fifth Street,
Los Angeles 13, California.
Attorneys for D. B. Lewis, President, Lewis Food Company; Henry Mello; Maynard (Mac) Folden and Grammont Banville.

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vs.

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Respondent.

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REPLY BRIEF FOR CERTAIN PETITIONERS.

I.

Section 7(b) of the Administrative Procedure Act Does Not Authorize Trial Examiners of the National Labor Relations Board to Rule on Petitions to Revoke Subpoenas.

The Board in its brief turns to Section 7(b) of the Administrative Procedure Act as an alternative, or additional, source of authority for trial examiners to rule on petitions to revoke subpoenas. Thus, the Board says

in its Summary of Argument (Brief for the Board, p. 8) that "Independently of the Labor Act, Section 7(b) of the Administrative Procedure Act provides an alternative source of authority for trial examiner determinations as to the validity of subpoenas." The argument is amplified by the Board under Point I of its argument (Brief for the Board, pp. 13-24).

This attempt to utilize Section 7(b) of the Administrative Procedure Act as an alternative and independent source of authority for trial examiners to rule upon petitions to revoke subpoenas is completely unsound.

Section 7(b) of the Administrative Procedure Act provides:

> "Officers presiding at hearings shall have authority, subject to the published rules of the agency and *within its powers*, to . . . (2) issue subpoenas *authorized by law*." (Emphasis added.)

Section 6(c) of the Administrative Procedure Act provides:

> "Agency subpoenas *authorized by law* shall be issued to any party upon request. . . ." (Emphasis added.)

What do the emphasized words "within its powers" and "authorized by law" mean? They mean that the hearing officer has subpoena powers only to the extent that the agency itself has such powers. This is clear both from the words of the statute and the Legislative History. Both House and Senate Committees said with reference to Section 7(b):

> "This section does not expand the powers of agencies." (Sen. Doc. No. 248, 79th Cong., 2nd Sess., 207, 269 (1946).)

At an earlier time the Senate Committee said:

> "It may seem logical that hearing officers should have compulsory process powers, but it has been felt that the grant of such powers is of such a nature and so important as to be better left to Congress in connection with specific legislation." (*Id.* at 29-30).

The words "within its powers" and "authorized by law" specifically prevent Section 7(b) and Section 6(c) of the Administrative Procedure Act from being utilized as a source of the subpoena power by agencies which had not otherwise been given the subpoena power. Thus, at the time of the enactment of the Administrative Procedure Act, agencies lacking the power to issue subpoenas included the Post Office Department, the War Department, the National Railroad Adjustment Board and the National Mediation Board. Virtually all agencies lacked the power to rule on petitioners to revoke subpoenas. In case of contest over a subpoena, the courts settled the question. Compare Section 6(c) of the Administrative Procedure Act.

The result is that a trial examiner of the Labor Board had only the powers possessed by the agency at the time of the passage of the Administrative Procedure Act. If the agency did not have the power to issue and/or revoke subpoenas, then the trial examiner had no such powers.

What then were the powers possessed by the National Labor Relations Board at the time of the passage of the Administrative Procedure Act. Section 11 of the Wagner Act provided that:

> "Any member of the Board shall have *power to issue subpoenas* requiring the attendance and testimony of witnesses and the production of any evi-

dence that relates to any matter under investigation or in question, before the Board, its member, agent or agency conducting the hearing or investigation." (Emphasis added.)

Under the Wagner Act, therefore, the Labor Board itself had only the power to issue subpoenas and did not have the power to revoke them. In case of a contest, the courts determined the validity of the subpoena. It follows that during the time that the Wagner Act and the Administrative Procedure Act were in effect, neither the Labor Board nor the examiners of the Board had power to revoke subpoenas.

This was the situation at the time that the National Labor Relations Act was passed in 1947. For the first time the National Labor Relations Board was given power to rule on petitions to revoke subpoenas. The language of Section 11 of the National Labor Relations Act, as amended in 1947, shows that Congress intended that the Board itself should exercise this power. The legislative history demonstrates that Congress expressly took the power away from trial examiners.

From what source then, does the trial examiner of the Board derive power to rule on subpoenas to revoke subpoenas? It certainly does not come from Section 11 of the National Labor Relations Act, as amended, since Congress expressly refused to give trial examiners the power to revoke subpoenas. The power was given to the Board alone. It certainly does not come from Section 7(b) of the Administrative Procedure Act, for the reason that under the Wagner Act, the Labor Board itself did not have power to rule on petitions to revoke subpoenas and Section 7(b) did nothing more than to

confer on trial examiners the same powers which the agency possessed at the time of the passage of the Administrative Procedure Act.

Section 6(c) of the Administrative Procedure Act provides, in effect, that when there is any question as to the validity of any subpoena "the court" shall determine its validity. Here is a complete answer to the contention of the Board that Section 7(b) of the Administrative Procedure Act "may reasonably be deemed" to confer full subpoena power upon trial examiners of the Board (Board Br. p. 8). Under Section 7(b) hearing officers are given authority to "issue subpoenas authorized by law." That is the extent of their authority. If there is any question about the validity of the subpoena, then Section 6(c) of the Act comes into play and the power to determine the validity of the subpoena is conferred upon "the court." Section 6(c) of the Administrative Procedure Act negates any attempt on the part of the Board to confer full subpoena powers upon Board trial examiners.

We submit, therefore, that Section 7(b) and Section 6(c) of the Administrative Procedure Act, when considered in the light of the legislative history of the Act relating to the words "within its powers" and "authorized by law" demonstrate conclusively that trial examiners of the Labor Board do not have the power to rule on petitions to revoke subpoenas.

II.

There Has Been No Final Administrative Action by the Board Which Is a Prerequisite to Judicial Enforcement of Review.

The Board contends in its brief in *National Labor Relations Board v. Duval Jewelry Company*, No. 234, that individuals subpoenaed by the Board have failed to exhaust their administrative remedy of a special appeal to the Board pursuant to Board regulations, and, therefore, this Court should order summary enforcement of the subpoenas. This contention was not made in the instant proceedings. However, we think that it is the Board that has failed to exhaust internal remedies and that the Board is premature in seeking enforcement of the subpoenas in the Federal District Court. In the *Duval* case, *supra*, the Fifth Circuit Court of Appeals held that, insofar as *subpoenas duces tecum* are concerned, the application for enforcement in the Federal District Court by the Board was premature, because the Board did not itself under Section 11(1) of the National Labor Relations Act, as amended, consider and rule on the petitions to revoke subpoenas. In the *Duval* case it is said that the Board's jurisdiction to pass on petitions to revoke *subpoenas duces tecum* is original, not appellate, and that the denial of the petitions by the trial examiner was a mere nullity. The Court also held that respondents (petitioners in this case) were not required to request "special permission of the Board" to appeal. The holding of the Fifth Circuit in the *Duval* case is that, until the Board itself has passed upon the petition to revoke subpoenas, there is no "contumacy or refusal to obey a subpoena" (see Section 11(2) of the National Labor Relations Act, as amended) and the matter of the enforcement

of the subpoenas is not ripe for the consideration of the Federal District Court. It is the view of the Fifth Circuit that the District Court should under such circumstances decline to rule upon the enforcement of the *subpoena duces tecum*.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be reversed and the cause remanded to the District Court with directions to quash the subpoenas forthwith, or, in the alternative, to refuse to entertain the proceedings on the ground that there has been no final administrative action which is a prerequisite to judicial enforcement or review.

WILLIAM M. FARRER, and
RAY L. JOHNSON, JR. for
HILL, FARRER & BURRILL,
WILLIAM H. WILSON,
Attorneys for D. B. Lewis, President; Lewis Food Company; Henry Mello; Maynard (Mac) Folden and Grammont Banville.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

D. B. LEWIS, PRESIDENT, LEWIS FOOD COMPANY, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

JEROME D. FENTON,
General Counsel,
National Labor Relations Board,
Washington 25, D. C.

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

Both the instant case and *National Labor Relations Board* v. *Duval Jewelry Co.*, No. 234, this Term, in which the Court granted certiorari on October 14, 1957, present the question whether the Board may by administrative regulation provide that applications to revoke subpenas which are returnable at a hearing shall be filed with and ruled on in the first instance by the officer presiding at such hearing, namely, the hearing officer in a representation case (as in *Duval*) or by a trial examiner in an unfair labor practice case (as in the instant case).[1] The instant case presents two further related questions,

[1] Here, unlike *Duval*, an independent source of authority with respect to subpenas is furnished by the Administrative Procedure Act (5 U. S. C. 1004 (c), 1006, 1010), applicable only to trial examiners.

not directly before the Court in *Duval,* but which are also of importance in the administration of the National Labor Relations Act. These concern the Board's power to delegate to subordinates the authority to issue subpenas and the standing of the Board's General Counsel to apply for subpenas as a "party" within the meaning of Section 11 (1) of the Act.

Accordingly, although the Board believes that the decision of the court below is correct on all these issues, in view of the pendency of the *Duval* case we do not oppose the granting of certiorari here and respectfully suggest that, if the writ issues, the instant case be set down for argument immediately following *Duval.*

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

JEROME D. FENTON,
General Counsel,
National Labor Relations Board.

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v.

NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

JEROME D. FENTON,
General Counsel,
THOMAS J. McDERMOTT,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
NORTON J. COME,
DUANE BEES N,
Attorneys,
National Labor Relations Board, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 684

D. B. LEWIS, PRESIDENT, LEWIS FOOD COMPANY; HENRY MELLO; MAYNARD (MAC) FOLDEN; GRAMMONT BANVILLE; JOE LOERA; ANASTACIO HOLQUIN; WILLIAM L. (ROY) MILLER; OTTO SCHUBERT; WALTER O. LISSER; AND WALTER SCHMIDT, SECRETARY-TREASURER OF ASSOCIATION OF INDEPENDENT WORKERS OF AMERICA, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 88–98) is reported at 249 F. 2d 832. The District Court issued no opinion, but its order is set forth at R. 83–84.

JURISDICTION

The judgment of the court below (R. 98–99) was entered on October 29, 1957. The petition for a writ of certiorari was filed on December 23, 1957, and

granted on January 27, 1958 (R. 99). The jurisdiction of this Court rests on 28 U. S. C. 1254.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are set forth in the Board's brief in the companion case, *National Labor Relations Board* v. *Duval Jewelry Company*, No. 234, this Term, pp. 55–59. The pertinent provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*) are set forth in the Appendix, *infra*, pp. 41–44. The relevant provisions of the Board's Rules and Regulations (29 C. F. R. 102.1, *et seq.*, Supp. 1956) are set forth at pp. 59–63 of the Board's brief in No. 234 and in the Appendix hereto, *infra*, pp. 44–47.

QUESTIONS PRESENTED

Section 11 (1) of the National Labor Relations Act, as amended (referred to herein as "the Act"), provides in relevant part that the "Board, or any member thereof, shall upon application of any party * * * forthwith issue to such party" subpenas requiring testimony or the production of evidence. The Section further provides that, within five days after service of a subpena on any such person requiring the production of evidence, "such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to * * * any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required."

Section 7 (b) of the Administrative Procedure Act provides, in relevant part, that "Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to * * * (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, * * * [and] (7) dispose of procedural requests or similar matters * * * *."

The questions presented are:

1. Whether the Board, by rule, may require that a petition to revoke a subpena returnable at a hearing in an unfair labor practice case—which is presided over by a trial examiner—shall be filed with, and ruled on in the first instance by the trial examiner, the Board reserving the right to review his ruling by "special appeal."[1]

2. Whether the Board, by rule, may authorize its Regional Directors to issue subpenas on behalf of a Board member.

3. Whether the General Counsel of the Board is, under Section 11 (1) of the Act, a "party" to an unfair labor practice case, and thus entitled to apply for issuance of subpenas.

STATEMENT

A. The unfair labor practice proceeding

On April 30, 1956, the General Counsel, acting on behalf of the Board and pursuant to his powers under the Act, issued through the Board's Regional Director

[1] The same question is presented in the *Duval* case, except that it involves a hearing officer in a representation case, who (unlike the trial examiner here) is not under the Administrative Procedure Act.

at Los Angeles a consolidated complaint against the Lewis Food Company and the Association of Independent Workers of America. The complaint alleged that the Company had engaged in unfair labor practices in violation of Section 8 (a) (1), (2) and (3), and that the Union had violated Section 8 (b) (1) (A) and (2). The consolidated complaint was issued and served upon the parties together with a notice that a hearing would be conducted, before a duly designated trial examiner of the Board, on the allegations set forth in the complaint (R. 19–25).

On June 1, 4 and 5, 1956, at the written request of the attorney assigned to try the case on behalf of the General Counsel of the Board, the Regional Director at Los Angeles issued several subpenas *ad testificandum* and *duces tecum*, under the seal of the Board and the facsimile signature of Abe Murdock, a member of the Board. The subpenas directed petitioners to appear at the hearing on June 11 and to testify and produce specified documents (R. 30–44). The subpenas *duces tecum* were addressed to petitioners Lewis and Schmidt, president of the Company and secretary-treasurer of the union, respectively, who were jointly charged with the commission of unfair labor practices, and called for the production of specified employment records of the Company and membership, organizational and dues records of the union (R. 30–32, 41–43). The subpenas *ad testificandum* were addressed to the remaining petitioners herein, who are employees of the Company (R. 32–40, 23, 28, 69).

On June 11, the day of the hearing, all petitioners filed petitions with the Board's Regional Director, but

addressed directly to the Board, requesting that the subpenas served upon them be revoked (R. 44–51). Their requests were predicated on the ground that the subpenas were invalid because (1) they had not been issued by the Board or a member thereof, as required by Section 11 (1) of the Act, and (2) the General Counsel of the Board was not entitled to obtain the subpenas in that he was not a "party" to the proceeding (*ibid.*). In addition, petitioners Lewis and Schmidt also challenged the relevancy of the documents which they were required to produce by the subpenas *duces tecum* served upon them (R. 44–45, 47–49).

The Board's Regional Director, in accordance with the Board's Rules and Regulations, referred the petitions to revoke the subpenas to the trial examiner for a ruling in the first instance (R. 51–52). On the same day, the hearing having opened, the trial examiner, following argument and over the objection of counsel for petitioners that he lacked authority to rule on the petitions to revoke, denied them (R. 56–68, 71–73). Petitioners did not appear in response to the subpenas, and their counsel stated to the trial examiner, after his ruling, that they would continue not to comply with the subpenas until ordered to do so (R. 74–75). Thereupon, counsel for the Board's General Counsel requested that the hearing be continued until the subpenas could be enforced, stating that the evidence to be adduced through the subpenaed witnesses was essential to the presentation of his case (R. 75–76). The request was granted, and the hearing was continued indefinitely (R. 80).

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B. The court proceedings for enforcement of the subpenas

On June 29, 1956, the Board, by its General Counsel, filed the present suit in the District Court for enforcement of the subpenas served upon petitioners (R. 3–9). Petitioners opposed the action on the grounds (1) that the Regional Director did not have authority to issue the subpenas, (2) the trial examiner did not have authority to rule upon the petitions to revoke the subpenas, and (3) the Board's General Counsel was not entitled to the issuance of the subpenas upon his application. Petitioners Lewis and Schmidt did not renew their objections to the relevance of the documents required to be produced by them under the subpenas *duces tecum* addressed to them (Pet. Br., p. 4).

The District Court, on July 30, 1956, issued an order denying enforcement of the subpenas on the authority of *National Labor Relations Board* v. *Pesante*, 119 F. Supp. 444 (S. D. Calif.) (R. 83–84). The *Pesante* case, so far as here relevant, held that (1) subpenas issued under the facsimile signature of a Board member are valid under the Act; (2) however, the Board must itself pass upon petitions to revoke subpenas; and (3) the General Counsel is not a "party" to a Board proceeding and hence neither he nor the attorneys under his supervision may request subpenas.

On appeal, the court below reversed the District Court's order (R. 98–99). Viewing the Board's procedure for the revocation of subpenas as a delegation by the Board of that function to the trial examiner, the court below held that the National Labor Rela-

tions Act authorized such a delegation. Following *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, which dealt with the Emergency Price Control Act, the court found sufficient authority for delegation of the revocation function in the Board's rule-making power under Section 6 of the Labor Act. The court noted that the latter Act "does not expressly forbid the Board to delegate this function," and that Congress manifested no "restrictive intention" respecting such delegation. In these circumstances, the court concluded, the Board's rule-making power could properly be used to authorize trial examiners to rule on the validity of subpenas and thereby avoid "The practical difficulties in administration which would [otherwise] arise, * * * [and] would substantially impede the effectuation of the Board's primary function" (R. 94–96).[2]

The court below also rejected petitioners' contentions that the subpenas were invalidly issued, and that the attorney assigned to try an unfair labor practice case on behalf of the General Counsel of the Board was not a "party" entitled to apply for subpenas (R. 91–92, 96–98).

SUMMARY OF ARGUMENT

I

The Board's procedure pursuant to which trial examiners in unfair labor practice cases rule in the first instance on petitions to revoke subpenas is valid.

[2] Although fully presented in the Board's brief, the court below did not pass on the additional contention that Section 7 (b) of the Administrative Procedure Act independently authorized the trial examiner to rule on the petitions to revoke the subpenas in this case.

The considerations advanced in the Board's brief in *National Labor Relations Board* v. *Duval Jewelry Company*, No. 234, this Term, a companion case, which show that the National Labor Relations Act authorizes such rulings by hearing officers in representation cases, apply with equal cogency to trial examiners in unfair labor practice cases.

Independently of the Labor Act, Section 7 (b) of the Administrative Procedure Act provides an alternative source of authority for trial examiner determinations as to the validity of subpenas. Such examiners, unlike hearing officers in representation cases, are vested by Section 7 (b) of the Administrative Procedure Act with authority to "issue subpenas authorized by law * * * rule upon offers of proof and receive relevant evidence * * * regulate the course of the hearing * * * dispose of procedural requests or similar matters * * *, [and] take any other action authorized by agency rule consistent with this Act." Each of these general powers may reasonably be deemed to encompass rulings upon a challenge to a subpena. In particular, the power to "issue subpenas" was intended by Congress to comprehend the full subpena power of the agency involved, including the decisional power respecting the propriety of subpenas. This intent is evidenced by the use of the qualifying phrase "authorized by law" following the grant of the power to "issue subpenas". This qualification indicates that the examiner is not merely to "issue" but also to rule on the legal sufficiency of the subpenas. This conclusion is also supported by the express association of the same phrase "issue sub-

penas" with a ruling as to sufficiency in Section 6 (c) of the Administrative Procedure Act. Usage by Congress of the term "issue" to include a determination of the validity of subpenas is readily understandable, for the ordinary practice of agencies, including that of the National Labor Relations Board prior to the 1947 amendments, has been to make the determination of validity upon the application for a subpena. Reading the authority to "issue subpenas" as encompassing authority to rule on a petition to revoke, moreover, comports with Congress' intent, strongly evidenced in the legislative history of the Administrative Procedure Act, to increase the stature and responsibility of hearing examiners. The purpose of vesting such examiners with the subpena power plainly was not merely to commit to them the clerical operation of furnishing subpenas on demand, but to make a grant of substantive power with respect to subpenas.

The subpena authority of trial examiners derived from Section 7 (b) of the Administrative Procedure Act is in no way contingent upon the delegability of that authority under the National Labor Relations Act. The grant of the authorities enumerated in Section 7 (b) is made independently of any agency statute, and, indeed, because of that Section, "an agency is without power to withhold such powers from its hearing officers." Attorney General's Manual on the Administrative Procedure Act (1947), p. 74. This factor distinguishes from the present case *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, and *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, which arose prior to the enactment

of the Administrative Procedure Act and dealt with the delegability of administrative subpena power under the particular statutes there involved.

II

In implementation of the statutory directive that the "Board or any member thereof, shall upon application of any party * * * forthwith issue to such party subpenas * * *," the Board furnishes to its regional offices and trial examiners blank subpenas bearing its seal and the facsimile signature of one of its members for their delivery to applying parties. This procedure is entirely valid. Petitioners' contentions that the procedure is an improper delegation of power is untenable for two reasons. First, viewed as a delegation of power, it involves no more than the ministerial task of automatically supplying subpenas and therefore is necessarily delegable, if, as we have shown in our brief in *Duval*, No. 234 (pp. 25-50), the substantive authority to rule on the validity of subpenas may be delegated. Second, inasmuch as the furnishing of subpenas under the Act is a ministerial act, no question of delegation is properly presented; delegation problems arise only with respect to discretionary acts. The propriety of the performance of routine ministerial acts by government agencies through subordinate officials has been long recognized. *Hitchcock* v. *Galveston*, 96 U. S. 341, 348. No reason appears for not applying the same principle here. To require the Board members personally to furnish subpenas would raise

needless impediments to the efficient administration of the Act without any compensating benefits.

III

There is no merit to petitioners' contention that the General Counsel of the Board was not a party to the unfair labor practice proceeding and therefore that Section 11 (1) of the Act, which provides for the issuance of subpenas "upon application of any party," precludes his access to compulsory process. The consequence of petitioners' argument is that one side, but not the other, is disallowed use of subpenas in unfair labor practice cases, for the Act expressly vests the General Counsel with the power of prosecution in all such cases.

The Act itself is wholly devoid of any support for this conclusion—a conclusion that negates the overriding purpose of the subpena power, *i. e.*, to permit decision to be based on all relevant facts that may properly be considered. On the contrary, in giving the General Counsel the power of investigation, of framing the issues in the complaint, and of handling all other aspects of the prosecution of unfair labor practice cases—all of which powers are to be exercised in the public interest rather than that of "any private person or group" (*Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265)—the Act plainly makes him an essential party.

The Administrative Procedure Act confirms this conclusion. That statute utilizes the term "party" to include agency prosecutors, and its legislative history shows that Congress intended that the subpena power

should be available to prosecutors and respondents alike in administrative adjudication.

ARGUMENT

The principal question in this case is the validity of the Board's procedures governing the revocation of subpenas in unfair labor practice cases. This question is similar to that presented in *National Labor Relations Board* v. *Duval Jewelry Company*, No. 234, this Term, which involves the validity of the Board's rules governing the revocation of subpenas in representation cases. Insofar as the National Labor Relations Act, as amended, serves as authority for these rules, the fact that No. 234 involves a representation proceeding and this case an unfair labor practice proceeding is irrelevant. The provision in Section 11 (1) relating to the revocation of subpenas applies to "all hearings and investigations * * * [under] section 9 [which deals with representation cases] and section 10 [which deals with unfair labor practice cases]." And the Board's Rules and Regulations vest identical authority in both hearing officers in representation cases and trial examiners in unfair labor practice cases to make initial rulings upon petitions to revoke subpenas, subject to the same appeal and review procedures before the Board. See the Board's brief in No. 234, pp. 17–20. Accordingly, the same considerations advanced in the Board's brief in No. 234, in support of our position that the Labor Act itself authorizes the Board to empower a hearing officer to rule initially on petitions to revoke subpenas, apply with equal force to a trial examiner in an unfair labor

practice case. We therefore respectfully refer the Court to the Board's brief in No. 234 (pp. 21–50) for our answer to petitioners' contention that the trial examiner in this case lacked power under the Act to rule on their petitions to revoke the subpenas.

Quite apart from the provisions of the Labor Act, however, we submit that Section 7 (b) of the Administrative Procedure Act independently authorizes trial examiners in unfair labor practice cases to determine the validity of subpenas. We thus show in Point I, below, that the Administrative Procedure Act provides alternative and equally cogent grounds for upholding the authority of the trial examiner to make the ruling in this case on petitioners' petitions to revoke the subpenas.

We shall then treat petitioners' remaining contentions. In Point II we show that the Board's procedures for the issuance of subpenas are valid, and in Point III we show that the Act makes subpenas available to the General Counsel of the Board, as the party responsible for the prosecution of an unfair labor practice case.

I. Section 7 (b) of the Administrative Procedure Act independently authorizes trial examiners in unfair labor practice cases to rule upon the validity of Board subpenas

The unfair labor practice proceeding in which petitioners were served with subpenas constituted a "case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," within the meaning of Section 5 of the Administrative Procedure Act, and therefore,

as required both by that Section and Section 7 (a), was heard by a trial examiner appointed pursuant to Section 11 of that statute.[3] Such trial examiners are vested with specific powers by the Administrative Procedure Act with respect to the hearings they conduct, including, in our view, the power to rule upon the validity of subpenas issued in an unfair labor practice proceeding.

Section 7 (b) of the Administrative Procedure Act provides:

> Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

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[3] On the other hand, representation proceedings under the National Labor Relations Act, like those involved in No. 234, are expressly excepted in Section 5 of the Administrative Procedure Act from the formal hearing requirements of that statute, including the requirement that hearing officers be appointed in accordance with the provisions of Section 11. Accordingly, a regional office attorney or field examiner usually serves as the hearing officer in a representation case.

The two general qualifications on this broad grant of authority—that the authority exercised by the presiding officer be "subject to the published rules of the agency and within its powers"—are plainly satisfied in this case. The Board's Rules and Regulations explicitly authorize the trial examiner to rule on the validity of subpenas, and, since Section 11 (1) of the Act expressly grants the Board power to issue and revoke subpenas, the exercise of such function by the trial examiner is "within [the agency's] powers."[4] See Board's brief in No. 234, pp. 15–20, esp. n. 6; *National Labor Relations Board* v. *International Typographical Union*, 76 F. Supp. 895, 898 (S. D. N. Y.). And, as we now show, the power to "issue subpenas authorized by law," as well as the other powers enumerated in Section 7 (b), comprehends ruling upon petitions to revoke subpenas. See *National Labor Relations Board* v. *International Typographical Union*, 76 F. Supp. 895 (S. D. N. Y.); *National Labor Labor Relations Board* v. *Gunaca*, 230 F. 2d 542 (C. A. 7), affirming 135 F. Supp. 790 (E. D. Wis.).[5]

[4] With reference to the phrase "within [the agency's] powers," the Attorney General's Manual on the Administrative Procedure Act (1947) points out (pp. 74–75): "* * * the subsection vests in hearing officer only such of the enumerated powers as the agency itself possesses. If an agency lacks the authority to issue subpenas, subsection 7 (b) does not grant the subpena power to that agency's hearing officers."

[5] As indicated *supra*, n. 2, the court below did not refer to the Administrative Procedure Act, finding that the National Labor Relations Act itself authorized delegation of the subpena power to trial examiners. The *Pesante* case, *supra*, relied on by the District Court in this case, involved revocation of a subpena by a hearing officer in a representation case, the

1. The authority to "issue subpenas" conferred by Section 7 (b) does not merely relate to the mechanical function of furnishing subpenas upon request. Congress meant thereby to vest hearing examiners with the full subpena power possessed by the agency involved, including the decisional power respecting the validity of subpenas—irrespective of whether the decisional power was exercised at the issuance stage or, as here, at a subsequent petition to revoke stage (see Board's brief in No. 234, pp. 26, n. 15, 28, n. 16). Thus, the qualifying phrase "authorized by law" immediately follows the grant of authority to "issue subpenas," indicating that a hearing examiner, in determining whether to issue subpenas, is to make a decision as to their legal sufficiency. This interpretation of the term "issue" is confirmed by Section 6 (c) of the Administrative Procedure Act which describes the subpena authority of agencies. It is there provided that subpenas "shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought." Here, the act of issuance of the subpena is expressly conditioned on a determination of its propriety. And, if the term "issue" expressly involves the exercise of decisional judgment under Section 6 (c), the identical term can

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situation in No. 234, and therefore the application of Section 7 (b) of the Administrative Procedure Act was not involved. The District Court in this case is, therefore, the only court, of those which have considered the application of Section 7 (b) to this problem, that has reached a conclusion adverse to the Board's position.

reasonably be said to carry the same meaning in Section 7 (b). Cf. *National Labor Relations Board* v. *Lion Oil Co.*, 352 U. S. 282, 290.

Nor is it significant that Congress mentioned only the issuance of subpenas and did not specifically refer to petitions to revoke them. The description by Congress of the general subpena power of administrative agencies in terms of issuance is readily understandable in view of the ordinary practice of agencies to make a determination of the propriety of a subpena upon application of a party therefor. Indeed, this was the situation under the National Labor Relations Act prior to the 1947 amendments. See Board's brief in No. 234, pp. 41–43. And, with reference to the Wage and Hour Act and the Emergency Price Control Act, respectively, see *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, and *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, discussed in the Board's brief in No. 234, pp. 26–27, n. 15.[6] The procedure under the Labor Act, as amended, achieves the same result in two steps instead of one—*i. e.*, the decision as to validity of the

[6] The usual rule is well illustrated by the remarks of the Court of Appeals for the Second Circuit with respect to the Federal Trade Commission Act: "[The] Commission is not bound to issue subpoenas *duces tecum* upon request as a ministerial act and then to entertain a motion to quash or to modify. It has a quasi-judicial discretion to deny the application." *Independent Directory Corp.* v. *Federal Trade Commission*, 188 F. 2d 468, 471. As to other agencies, see Note, *Subpoenas and Due Process in Administrative Hearings*, 53 Harv. L. Rev. 842, 847; Davis, *Administrative Law* (1951), p. 303. Compare *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 306.

subpena is merely transferred from the issuance stage to the petition to revoke stage. In these circumstances, it would exalt form over substance to conclude that Congress did not intend to encompass this procedure as well as the more conventional procedure where discretion was exercised at the issuance stage. Clearly, Congress could not have been expected in Section 7 (b) to spell out explicitly every conceivable subpena procedure which it intended to cover.

Viewing the grant of power to hearing examiners to issue subpenas, contained in Section 7 (b) of the Administrative Procedure Act, as encompassing power to rule on the subpoenas' validity, is consistent, moreover, with Congress' underlying purpose in giving hearing examiners the various functions enumerated in that Section. The powers enumerated in Section 7 (b), including the subpena power, reflect a Congressional "purpose to increase the importance of the role of examiners in the administrative process." *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, 495. The Attorney General's Committee on Administrative Procedure, whose report was heavily relied on by the draftsmen of the Administrative Procedure Act, strongly urged that more responsibility be given to hearing officers; that they "be fully empowered by statute to preside at hearings, issue subpoenas, administer oaths, rule upon motions, carry out other duties incident to the proper conduct of hearings, and make findings of fact, conclusions of law and orders for the disposition of matters coming before them." Final Report (Gov't

Print. Off., 1941), p. 50; see also pp. 45–46, 51. Section 7 (b) was drafted in direct response to these recommendations. As explained by the Senate Committee which reported out the bill which was subsequently enacted, "The statement of the powers of administrative hearing officers [contained in Section 7 (b)] is designed to secure that responsibility and status which the Attorney General's Committee stressed as essential." Sen Comm. Print S–7 (Revised), 79th Cong., 1st Sess., p. 14, Leg. Hist. of the Administrative Procedure Act, p. 29.[7] And, as further stated in the Senate Report, Section 7 (b) "is designed to assure that the presiding officer will perform a real function rather than serve merely as a notary or policeman." Sen. Rep. 752, 79th Cong., 1st Sess., p. 21, Leg. Hist., p. 207. See, also, Davis, *Administrative Law* (1951), pp. 309, 312. Indeed, to insure the desired result that "formal administrative adjudication" at the hearing stage be handled by "competent and well-paid men exercising functions of responsibility and interest" (Final Report, *supra*, at p. 46), Congress took steps "to make hearing examiners 'a special class of semi-independent subordinate hearing officers' * * * " (*Ramspeck* v. *Trial Examiners Conference*, 345 U. S. 128, 132, quoting from Sen. Rep. 752, 79th Cong., 1st Sess., Leg. Hist., p. 192). See Section 11 of the Administrative Procedure Act.

[7] The materials constituting the legislative history of the Administrative Procedure Act are published in a single volume, issued as Sen. Doc. 248, 79th Cong., 2d Sess., hereafter referred to as "Leg. Hist."

There can be little doubt that a reading of Section 7 (b) so as to vest only the mere clerical function of furnishing subpenas in hearing examiners deemphasizes rather than enhances the stature and responsibility of trial examiners. On the other hand, the reading which we have suggested—which empowers hearing examiners to exercise their judgment as to the propriety of subpenas in the hearings before them—is consistent with and implements the Congressional intent to increase the substantive powers and stature of trial examiners in administrative hearings. For the essence of subpena power is not the ministerial act of supplying a subpena on demand, but the substantive act of ruling on its validity. See Davis, *Administrative Law* (1951), pp. 81, 312.

Finally, it should be noted that Section 7 (b) of the Administrative Procedure Act, in addition to empowering a hearing examiner to issue subpenas, authorizes them to "rule upon offers of proof and receive relevant evidence * * * regulate the course of the hearing * * * dispose of procedural requests or similar matters, * * * and * * * take any other action authorized by agency rule consistent with this Act." The authority of the hearing examiner to rule on the validity of a subpoena may quite properly rest on these powers independently of the issuance power. Authority to "receive relevant evidence," to "regulate the course of the hearing," and to "dispose of procedural requests or similar matters" are stated in general terms, and may reasonably be deemed to encompass rulings upon a challenge to the validity of a subpoena. Moreover, the Board Rule providing that the initial

decision upon a petition to revoke a subpena shall be made by the trial examiner gives due recognition to the role which Congress intended him to play in administrative hearings. This is certainly "consistent with [the Administrative Procedure] Act" and therefore permitted by the final clause of Section 7 (b).

In sum, both the power to issue subpenas and the various powers relating to the conduct of hearings by trial examiners, enumerated in Section 7 (b) of the Administrative Procedure Act, whether considered separately or together, authorize such examiners to rule on challenges to the propriety of subpenas. Hence, that Act furnished an independent source of authority for the trial examiner in this case to rule on the petitions to revoke the subpenas served on petitioners.[8] Indeed, as Judge Medina added, in arriving at the same conclusion (*National Labor Relations Board* v. *International Typographical Union*, 76 F. Supp. 895, 896–897 (S. D. N. Y.)):

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[8] In this case, petitions to revoke were filed, and denied by the trial examiner, with respect to both subpenas *duces tecum* and subpenas *ad testificandum* (*supra*, pp. 4–5). It is the Board's position that the National Labor Relations Act and the Administrative Procedure Act authorize its trial examiners to revoke both types of subpenas. It has been suggested, however, that Section 11 (1) of the National Labor Relations Act provides only for the revocation of subpenas *duces tecum*, and that no authority is given even to the Board itself to revoke subpenas *ad testificandum*. Thus, the statutory language dealing with revocation refers only to "a subpena * * * requiring the production of any evidence in his possession or under his control," and permits revocation if "the evidence whose production is required does not relate to any matter under investigation * * * or if * * * such subpena does not describe with sufficient particularity the evidence whose production is required." This was

> Great care was taken by the Congress so to frame the text of the Labor Management Relations Act of 1947 that it would function pari passu with the Administrative Procedure Act * * *. This co-relation was particularly important in the case of the powers of trial examiners because of the separation in the Labor Management Relations Act of 1947 of the prosecutory functions on the one hand and the judicial and quasi-judicial functions on the other. * * *.
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>
> Thus, as the two statutes are to be read together, it seems reasonably clear that the National Labor Relations Board was authorized

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the view of the Court of Appeals in No. 234 (see R. in No. 234, p. 162).

If this reading of Section 11 be valid, the petitions to revoke the subpenas *ad testificandum* were superfluous, and petitioners could not defend against enforcement of those subpenas on the ground that there had been no ruling on the petitions by the Board.

In the Board's view, however, Section 11 of the National Labor Relations Act should not be construed to limit the application of the revocation procedure to subpenas *duces tecum*. Inasmuch as testimonial subpenas, like subpenas calling for documents, must be issued forthwith on application, there are occasions when a petition to revoke or a motion to quash would be the only reasonable procedure for challenging and obtaining a ruling from the Board on their validity, *e. g.*, where the person served with the subpena is confined in an institution. Cf. *New Britain Machine Co.*, 105 N. L. R. B. 646. A revocation procedure for testimonial subpenas is not expressly forbidden and would appear to be within the Board's power, as stated in Section 6 of the National Labor Relations Act, "to make * * * such rules and regulations as may be necessary to carry out the provisions of this Act." Accordingly, the Board believes that the same revocation question presented with respect to subpenas *duces tecum* exists with respect to subpenas *ad testificandum*, and the court below so assumed (R. 93, n. 2).

> to formulate rules pursuant to the terms of which trial examiners might issue subpenas and "dispose of procedural requests or similar matters," such as the determination of whether or not, to use the traditional term, subpenas should be quashed. * * *

2. As we have shown in our brief in No. 234 (pp. 15–24), the Board, although requiring that petitions to revoke subpenas be ruled on in the first instance by the trial examiner or the hearing officer, as the case may be, retains, through its "special appeal" procedure, an overriding decisional authority; therefore, there has been no true delegation of the Board's subpena power. However, should the Board's subpena procedure nevertheless be regarded as entailing a delegation of Board power, Section 7 (b) of the Administrative Procedure Act has the additional effect of removing any question of delegation insofar as trial examiners in unfair labor practice cases are concerned. That is, where, as here, the agency involved possesses the subpena power, Section 7 (b) directly vests that power in the hearing examiner as well. The net result is as if Section 11 (1) of the Labor Act itself specifically provided that the subpena power shall be exercised by the Board or its trial examiners. As stated in the Attorney General's Manual on the Administrative Procedure Act (p. 74):

> In other words, not only are the enumerated powers thus given to hearing officers by section 7 (b) without the necessity of express agency delegation, but an agency is without power to withhold such powers from its hearing officers. This follows not only from the

statutory language, "shall have authority," but from the general statutory purpose of enhancing the status and role of hearing officers.[9]

For this additional reason, neither *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, nor *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, has any relevance to the instant case. These cases (discussed more fully in our brief in No. 234, pp. 25–30), which arose prior to the effective date of the Administrative Procedure Act, dealt with the question of whether the statutes there involved warranted the inference that Congress had intended to permit delegation of subpena powers. The Administrative Procedure Act removes any need for implication in the situations it governs, by directly vesting subpena power in hearing examiners.[10]

II. The Board may properly authorize its regional director to issue subpenas on behalf of a Board member

Section 11 (1) of the National Labor Relations Act provides that the "Board or any member thereof, shall upon application of any party" to a proceeding, "forthwith issue to such party subpenas." As stated by the Court of Appeals for the Seventh Cir-

[9] See, also, Nathanson, *Some Comments on the Administrative Procedure Act*, 41 Ill. L. Rev. 368, 391–392.

[10] See the statement in the Attorney General's Manual on the Administrative Procedure Act, p. 74, n. 2: "Since section 7 (b) itself vests these powers (including the subpena power) in hearing officers, *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357 (1942), and *Fleming* v. *Mohawk Co.*, 331 U. S. 111 (1947), dealing with the authority of agencies to delegate such powers, have no application here."

cuit. (*National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156, 160):

> This [provision] made the issuance of subpoenas mandatory. All discretion as to their issuance was removed. The only function in connection with subpoenas which is not now a ministerial act under this section is the determination to either grant or refuse the petition to revoke.

The Board has implemented this provision in this way: blank subpenas bearing the Board's seal and the facsimile signature of a Board member are supplied its regional offices and trial examiners; upon the application of a proper party, the Regional Director (if, as here, the request occurs prior to the hearing), or the hearing official (if the request occurs at the hearing), automatically issues the subpena to the applicant. This procedure was followed in this case when the trial attorney representing the Board's General Counsel requested the subpenas here involved from the Regional Director, who in turn issued them to the attorney, under the facsimile signature of a Board member. As noted by the court below (R. 91–92), the validity of this procedure has been upheld by every court which has had occasion to pass on it. See *National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156 (C. A. 7); *Edwards* v. *National Labor Relations Board*, 189 F. 2d 970 (C. A. 5), certiorari denied, 342 U. S. 870; *Jackson Packing Co.* v. *National Labor Relations Board*, 204 F. 2d 842 (C. A. 5); *National Labor Relations Board* v. *Gu-*

naca, 135 F. Supp. 790, 793–795 (E. D. Wis.), affirmed, 230 F. 2d 542 (C. A. 7), vacated and dismissed as moot, 353 U. S. 902; *National Labor Relations Board* v. *Pesante*, 119 F. Supp. 444, 455–456 (S. D. Calif.). Petitioners nonetheless assert that Section 11 (1) of the Act requires that the Board or one of its members personally perform the mechanical operation of furnishing subpenas when requested.

Petitioners' position rests on the assumption that the procedure thus described entails a delegation of Board power to subordinates, contrary to the terms of the statute. This view is erroneous for two reasons. First, even if there be a delegation of the power to issue, such delegation would not be barred by the Act. If, as our alternative argument in *Duval* establishes (Board's brief, pp. 25–50), the Act does not bar the Board from delegating to subordinates the power to rule on petitions to revoke subpenas, it follows, *a fortiori*, that the Act permits a delegation of the lesser, ministerial task of furnishing subpenas "forthwith" upon request.

Second, properly speaking, the Board's issuance procedure presents no delegation question at all. A problem of delegation exists only where the subordinate official is authorized to perform a discretionary act entailing the exercise of judgment, which is not subject to any direct control or supervision by the agency head. In this sense, not even the Board's revocation procedure involves a true delegation, for, although discretion is involved, the hearing officer's decision is subject to direct control by the Board

(Board's brief in No. 234, pp. 21–24). Since no act of discretion is involved in the grant of a Board subpena, it is even clearer that the issuance procedure likewise involves no delegation in any legal sense. In instructing its Regional Directors to grant the subpenas forthwith upon request, the Board does no more than utilize such officials as its mechanical arms in the performance of a ministerial act. See Davis, *Administrative Law* (1951), p. 81.

The propriety of an agency's carrying on its routine, nondiscretionary business through its subordinate officials cannot seriously be questioned. This method of conducting government affairs has long been acknowledged as permissible and necessary under the common sense principle that a public body, "like every other corporation, * * * could do its ministerial work by agents." *Hitchcock* v. *Galveston*, 96 U. S. 341, 348. As stated by this Court, in rejecting a claim that a statute placing specified notice requirements on the Secretary of War was not complied with when the notice in fact was given by an official under the Secretary (*Miller* v. *Mayor of New York*, 109 U. S. 385, 394):

> When a secretary of the government is required to give information on any subject, he may act, and generally does act, through officers under him. He is not expected to make over his own signature all the communications required from the department of which he is the head. It would be impracticable for him to do so. The official communication is deemed

made by him when it is made under his sanction and direction."

No reason appears for not applying this principle to the Board's procedures for the granting of subpenas. To say that only a Board member may fill out and deliver the subpena is in effect to require the members of the Board to act as messenger boys. It might as well be said that the clerk of a federal district court is without power to authorize his deputy to deliver the signed and sealed subpenas that must be granted forthwith under Rule 45 (a) of the Federal Rules of Civil Procedure. Plainly no such stultifying impediment to the exercise of the subpena power was contemplated. Moreover, to require Board members personally to furnish subpenas would raise needless obstacles to an efficient handling of representation and unfair labor practice cases. As emphasized by the Court of Appeals for the Seventh Circuit (*National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156, 160):

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[11] Compare the statement in *United States* v. *Bareno*, 50 F. Supp. 520, 527–528 (D. Md.):

"Heads of Government departments and boards must act, and presumably have been acting time out of mind, vicariously in the performance of their routine business. It is impossible for them to do otherwise and dispose of the large volume of work. But they still remain * * * responsible for the acts of their subordinates."

See, also, *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194, 206; *Tung Tui* v. *Edsell*, 223 U. S. 673, 682; *United States* v. *Chemical Foundation*, 272 U. S. 1, 13, *Shreveport Engraving Co., Inc.* v. *United States*, 143 F. 2d 222, 227 (C. A. 5); *In re Triangle S. S. Co.*, 3 F. 2d 894, 896 (C. A. 2), certiorari denied, 267 U. S. 597.

> If * * *, it is necessary for the Board, or a member thereof, to not only sign his name and affix the seal of the Board to each subpoena, but also to fill in all of the blanks and then to issue it to the party or cause it to be served, it would first be necessary to send to the Board a copy of the application for the subpoena, the information required for filling in all the blanks, and a showing that the applicant for the subpoena was a party to the particular proceedings. If the proceedings were being held on the West coast or at any other far distant point, the expression "forthwith" would lose all significance.

Petitioners assert, however, that the furnishing of subpenas "is not ministerial" because the task presupposes a determination by the issuing officer as to "(a) whether there is a proceeding pending such as described in Section 11 (1) and (b) whether the applicant is a bona fide party to the proceeding" (Br. p. 27). These prerequisites to the furnishing of subpenas scarcely make less mandatory the requirement that subpenas be issued "forthwith." As explained by this Court in rejecting a similar contention (*Roberts* v. *United States*, 176 U. S. 221, 231):

> Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial

> one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. * * *[12]

Moreover, rulings upon questions that may arise as to the propriety of issuing a subpena under the Act have been expressly provided for under the procedure for revocation. Indeed, it was by the filing of petitions to revoke that petitioners raised the question of whether the General Counsel of the Board was a party entitled to apply for subpenas in this case. This further demonstrates that, at the very most, all that is required for the granting of a subpena under Section 11 (1) of the Act is a colorable claim that the applicant is a party to a Board proceeding, and its evaluation calls for no greater degree of judgment on the part of the issuing authority than that involved in many ministerial acts.

Inasmuch as the Board has no discretion to withhold a subpena requested by any party, this Court's decisions in *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, and *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, relied on by petitioners, have no application to the present question. The delegated subpena powers in those cases included the discretionary determination of whether a subpena was valid, a determination made under the National Labor Relations Act only upon the filing of a petition to revoke.

[12] See, also, *Work* v. *McAlester-Edwards Co.*, 262 U. S. 200, 208; *Miguel* v. *McCarl*, 291 U. S. 442.

See Board's brief in No. 234, pp. 26–27, n. 15. There is nothing in the *Cudahy* decision to suggest that where the furnishing of a subpena is ministerial, as here, the act may not be performed through a subordinate official.

In sum, the Board's rule respecting the furnishing of subpenas by Regional Directors is within established principles authorizing the use of assistants to perform ministerial acts, and is otherwise consistent with, and effectuates the administration of, the Act.[13]

III. The Act makes subpenas available to the General Counsel of the Board in the prosecution of an unfair labor practice case

Asserting that the General Counsel of the Board was not a party to the unfair labor practice proceed-

[13] It may be noted that, as a matter of sound administrative practice, trial attorneys and others on the staff of the Board's General Counsel who have occasion to request subpenas, are required to consider carefully the propriety of applying for subpenas in the light of specified criteria. Thus, the Board's Field Manual provides in part:

"Section 11770 * * * investigative subpenas are not to be used unless and until all reasonable means of obtaining the same information by other means have been exhausted.

"Section 11772 * * * in addition to the necessity for the subpena, however, [the regional office employee handling the case] must take into consideration the potential enforcement of the subpena. The subpena should not be requested if it appears that it cannot be enforced in the event of noncompliance.

"Section 11776 * * * A subpena duces tecum should be drafted as narrowly and specifically as is consistent with the ends sought * * *. In all but the exceptional case, it is advisable to provide, *in the body of the subpena*, for alternatives in lieu of physical production—e. g., that the party against whom the subpena runs may furnish a signed statement setting forth the desired information, provided that pertinent records are made available to Board agents for the purpose of checking the accuracy of the statement."

ing, petitioners contend that the subpenas requested by him and served on them were not issued "upon application of any party," as Section 11 (1) of the Act provides, and therefore are invalid (Br., pp. 31–33). It is apparently petitioners' position that the General Counsel, who is made responsible under the Act for the prosecution of all unfair labor practice cases (*infra*, pp. 33–35), has been deprived by Section 11 (1) of the authority, usually critical to a prosecution, to subpena witnesses and documentary evidence in his presentation of such cases. Petitioners suggest that the person filing an unfair labor practice charge may be entitled to apply for subpenas in order to prove the allegations of the complaint (Br., p. 32), but are silent as to how the subpena power may be utilized by the prosecution where, as is frequently the situation, the charging party does not appear or participate in the hearing.[14] The contention was found "unten-

[14] The only person in unfair labor practice proceedings expressly given a right under the Act "to appear * * * and give testimony at the place and time fixed in the complaint" is the respondent. Section 10 (b) of the Act. Cf. *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 362–363; *Semi-Steel Casting Co.* v. *National Labor Relations Board*, 160 F. 2d 388, 393 (C. A. 8), certiorari denied, 332 U. S. 758; *Oughton* v. *National Labor Relations Board*, 118 F. 2d 486, 495–496 (C. A. 3), certiorari denied, 315 U. S. 797. Section 10 (b) of the Act also provides that "any other person may be allowed to intervene," but the authority to grant intervention is reposed "In the discretion of the member, agent, or agency conducting the hearing." In its Rules and Regulations (Section 102.8, *infra*, p. 44) the Board has provided that charging parties may participate as parties in unfair labor practice proceedings, but advantage is not always taken of this privilege.

able" by the court below (R. 97).[15] To sustain it would require the most cogent showing of a deliberate Congressional intent, for the consequence would be to emasculate the function of the General Counsel as prosecutor and to negate the underlying purpose of the subpena power, *i. e.*, to permit decision to be based on all of the relevant facts which may properly be considered in the determination of a case. Cf. *Wilson* v. *Rousseau*, 4 How. 646, 678. No such showing, however, can be made. On the contrary, as we now point out, the entire scheme of the Act, the nature of the rights it creates, and its legislative history, as well as applicable provisions of the Administrative Procedure Act, manifest an unambiguous intent to make subpenas available to the General Counsel of the Board in unfair labor practice cases, just as they are to other parties.

As stated above, Section 11 (1) of the Act requires the issuance of subpenas "upon application of any party," but the Act does not contain an express definition of the term "party." The Act does make clear, however, that the General Counsel of the Board is

[15] *National Labor Relations Board* v. *Pesante*, 119 F. Supp. 444 (S. D. Cal.), relied on by the District Court in this case, involved the issuance of subpenas upon the application of a regional director of the Board in a representation case, and to that extent presented a different question than that now before the Court. Many of the same considerations hereafter discussed in the text, however, serve to demonstrate that regional directors in representation cases, no less than the General Counsel in unfair labor practice cases, are intended by the Act to make full use of subpenas in the performance of their duties, and the Court of Appeals in No. 234 has so concluded (R. in No. 234, pp. 164–166).

the prosecuting party in all unfair labor practice cases. Thus, Section 3 (d) of the Act provides:

> [the General Counsel] shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board * * *.

Pursuant to this authority, the General Counsel conducts the investigation of all unfair labor practice charges, frames the issues in the case by his complaints, adduces evidence and cross-examines witnesses, and handles all other aspects of the prosecution of the case.[16] Moreover, he is even entitled to enter into binding stipulations with a respondent in the course of a hearing without the concurrence of the charging party. *International Union, Automobile Workers* v. *National Labor Relations Board*, 231 F. 2d 237, 242 (C. A. 7), certiorari denied, 352 U. S. 908. In short, the General Counsel is a principal party to the proceeding and indispensable to the prosecution of the case. As summarized by the court below (R. 97):

> Here then is an official who has life-or-death authority over the initiation of an unfair labor practice proceeding and who, if he determines that such proceedings should be commenced, is entrusted with the task of prosecution. Yet appellees urge that this official lacks authority to

[16] See, *e. g.*, *Bonwit Teller Co.* v. *National Labor Relations Board*, 197 F. 2d 640, 644 (C. A. 2), certiorari denied, 345 U. S. 905; *American Newspaper Publishers Association* v. *National Labor Relations Board*, 193 F. 2d 782, 798 (C. A. 7); *Haleston Drug Stores, Inc.* v. *National Labor Relations Board*, 187 F. 2d 418, 421 (C. A. 9), certiorari denied, 342 U. S. 815; *Lincourt* v. *National Labor Relations Board*, 170 F. 2d 306, 307 (C. A. 1).

apply for the issuance of a subpoena. The argument is untenable.

The reasons for the critical role thus given to the General Counsel in unfair labor practice proceedings further demonstrate that the Act contemplates the availability to him of compulsory process. Control of unfair labor practice proceedings is denied private parties because Congress intended the substantive rights guaranteed in the Act to be vindicated in the public interest, and not for the benefit of "any private person or group." *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265. As this Court stated with reference to the Wagner Act, under which the Board possessed the prosecutory responsibilities now vested in the General Counsel (*National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 362):

> The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights. * * * It has few of the indicia of a private litigation and makes no requirement for the presence in it of any private party other than the employer charged with an unfair labor practice. The Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining * * *.

By amending the Act in 1947 and establishing the independent office of General Counsel to handle the initiation and prosecution of unfair labor practice cases, Congress in no wise altered the public char-

acter of the rights involved in such cases or lessened the public nature of the prosecuting authority's function. *Garner* v. *Teamsters Union*, 346 U. S. 485, 492–494; *Haleston Drug Stores, Inc.* v. *National Labor Relations Board*, 187 F. 2d 418, 420–421 (C. A. 9), certiorari denied, 342 U. S. 815.

From the foregoing it is plain that the General Counsel's function with respect to unfair labor practice proceedings is to exercise his extensive control over presentation of cases in conformity with the dictates "of the recognized public interest." *Amalgamated Utility Workers* case, *supra*, at p. 266. Manifestly, the ability to use subpenas to reach witnesses and documentary evidence otherwise unavailable is essential to the performance of this role. And the role itself, by its very nature, is that of a "party" to an unfair labor practice proceeding. Nothing in the Act points to a contrary conclusion.[17]

[17] Petitioners assert that the General Counsel is not a party within the meaning given to that term in Section 102.8 of the Board's Rules and Regulations (Br., pp. 31–32). In the first place, that Section does not purport to define "party" as used in the Act, but rather only "as used in this part" (the Rules and Regulations). Secondly, the Section in no way purports to deny the General Counsel the status of a "party," and indeed may properly be construed to cover him within the general phrase "any person * * * entitled as of right to be admitted as a party * * *." Finally, the many provisions of the Rules and Regulations describing the procedures which "parties" are required to follow in unfair labor practice cases—respecting such matters as motions, depositions, examination of witnesses, filing of briefs and the like—make it apparent that the General Counsel is within the term "party" as used in the Board's Rules. See *e. g.*, Rules and Regulations, Sections 102.16, 102.30 (f), 102.38, 102.42, 102.46, 102.47, *infra*, pp. 45–47.

Moreover, the legislative history of the 1947 amendments to the Act contains no suggestion that Congress intended to make the drastic statutory change which petitioners urge. Clearly, the Wagner Act did not deprive the prosecuting authority in an unfair labor practice case of the right to compulsory process. Section 11 (1) of the original Act read simply that "Any member of the Board shall have power to issue subpenas * * *." The phrase "upon application of any party" was added in 1947 in connection with the new requirement that subpenas be issued "forthwith." There is no indication that the prosecutor of an unfair labor practice case was not to be included within the term "party." Indeed, as more fully explained in the Board's brief in No. 234, pp. 41–47, Congress, in adding the new provision, evidenced its purpose to change the Wagner Act procedure only in the one respect of requiring that subpenas be issued automatically and that the ruling on their validity be postponed to the filing of a petition to revoke. Hence, Congress fully contemplated that the subpena power traditionally available to the prosecution in an unfair labor practice case would continue to be available under the amendments.

The Administrative Procedure Act confirms the foregoing conclusion. Section 6 (c) of that Act provides that "Agency subpenas authorized by law shall be issued to any party upon request * * *." The general, but non-exclusive, meaning given to the term "party" in Section 2 (b) is broad enough to include the General Counsel in an unfair labor practice case:

> "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding * * *.[18]

That this definition includes the prosecuting agency in administrative adjudication is made explicit, moreover, in Section 5 (c). It is there provided that "Save to the extent required for the disposition of ex parte matters as authorized by law, no such [hearing] officer shall consult any person or *party* on any fact in issue unless upon notice and opportunity for all parties to participate * * *" (emphasis added). It seems clear that "party," as used in this section, encompasses the General Counsel in an unfair labor practice case, for the purpose of Congress here was to make sure "that no investigating or prosecuting officer shall directly or indirectly in any manner influence or control the operations of hearing and deciding officers, except as a participant in public proceedings * * *." Sen. Rep. 752, 79th Cong., 1st Sess., Leg. Hist., p. 203. See also, Sen. Comm. Print, Leg. Hist., pp. 24–25; H. Rep. 1980, 79th Cong., 2d Sess., Leg. Hist., p. 262. Finally, the legislative history of the provisions of the Adminis-

[18] The office of the General Counsel of the Board is plainly an "agency" within the above language, for that term in Section 2 (a) is described as "each authority * * * of the Government," and was meant to include "whatever persons are vested with powers to act." Sen. Rep. 752, 79th Cong., 1st Sess., Leg. Hist., p. 196. And, as stated *supra*, n. 17, with respect to the similar wording of Section 102.8 of the Board's Rules and Regulations, the nature of the General Counsel's functions in an unfair labor practice case bring him within the phrase "entitled as of right to be admitted as a party."

trative Procedure Act dealing with subpenas discloses that Congress gave full recognition to the practice of agency prosecuting authorities in making use of compulsory process. The only reform intended by that Act in this respect was directed, not to the general use made by agencies of subpenas, but to the practice in some instances of imposing discriminatory requirements on private parties applying for subpenas. As stated in the Senate Committee Print explaining the bill which became law, the purpose of the subpena provisions is to (Leg. Hist., p. 27):

> Assure that private parties as well as agencies shall have a right to such subpenas. This is an indispensable requisite to fair procedure since if the private party does not have the benefit of compulsory process he may not be able to secure witnesses or evidence while the agency can have such process for its own purposes. * * *

See also Sen. Rep. 752, 79th Cong., 1st Sess., p. 20, Leg. Hist., p. 206; H. Rep. 1980, 79th Cong., 2d Sess., p. 33, Leg. Hist., p. 265; Attorney General's Manual on Administrative Procedure Act (1947), pp. 67–68.

Accordingly, both the Administrative Procedure Act and the National Labor Relations Act require that petitioners' contention be rejected. Neither of these enactments casts any doubt upon the validity of the essential and established practice of the General Counsel in unfair labor practice cases in making full use of the subpena power wherever necessary to present competent evidence bearing on the issues to be determined.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

J. LEE RANKIN,
Solicitor General.

JEROME D. FENTON,
General Counsel,
THOMAS J. MCDERMOTT,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
NORTON J. COME,
DUANE B. BEESON,
Attorneys,
National Labor Relations Board.

APRIL 1958.

APPENDIX

The relevant portions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*) are as follows:

DEFINITIONS

SEC. 2. As used in this Act—

(a) *Agency.*—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. * * *

(b) *Person and party.*—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

* * * * *

ADJUDICATION

SEC. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant

to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives.

* * * * *

(c) Separation of functions.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings.

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ANCILLARY MATTERS.

SEC. 6. Except as otherwise provided in this Act—

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(c) *Subpenas.*—Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence

sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

* * * * *

HEARINGS

SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

* * * * *

(b) *Hearing powers.*—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommment decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

* * * * *

EXAMINERS

SEC. 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpena witnesses or records, and pay witness fees as established for the United States courts.

The relevant provisions of the Board's Rules and Regulations (29 C. F. R. 102.1, *et seq.*, Supp. 1956),

in addition to those set forth at pp. 59–63 of the Board's Brief in No. 234, are as follows:

SEC. 102.8 *Party.*—The term "party" as used herein shall mean the regional director in whose region the proceeding is pending, and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the act, any person named as respondent, as employer, or as party to a contract in any proceeding under the act, and any labor organization alleged to be dominated, assisted, or supported in violation of section 8 (a) (1) or 8 (a) (2) of the act; but nothing in this part shall be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only.

* * * * *

COMPLAINT

SEC. 102.16 *Hearing; extension.*—Upon his own motion or upon proper cause shown by any other party, the regional director issuing the complaint may extend the date of such hearing.

* * * * *

WITNESSES, DEPOSITIONS, AND SUBPENAS

SEC. 102.30 *Examination of witnesses; depositions.* * * *

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(f) If the parties so stipulate in writing, depositions may be taken before any person at any time or place, upon any notice and in any manner, and when so taken may be used like other depositions.

* * * * *

SEC. 102.38 *Rights of parties.*—Any party shall have the right to appear at such hearing in person, by counsel, or by other representative, to call, examine and cross-examine witnesses, and to introduce into the record documentary or other evidence, except that the participation of any party shall be limited to the extent permitted by the trial examiner.

* * * * *

SEC. 102.42 *Filing of briefs and proposed findings with the trial examiner and oral argument at the hearing.*—Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. Any party shall be entitled, upon request made before the close of the hearing, to file a brief or proposed findings and conclusions, or both, with the trial examiner who may fix a reasonable time for such filing, but not in excess of 20 days from the close of the hearing. * * *

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EXCEPTIONS TO THE RECORD AND PROCEEDING

SEC. 102.46 *Exceptions or supporting briefs; time for filing; where to file; service on parties; extension of time; effect of failure to include matter in exceptions; oral arguments.*—(a) within 20 days or within such further period as the Board may allow from the date of the service of the order transferring the case to the Board, pursuant to section 102.45, any party may (in accordance with section 10 (c) of the act and section 102.82 and 102.83) file with the Board in Washington, D. C., seven copies of a statement in writing setting forth exceptions to the intermediate report and recommended order or to any other part of the record or proceedings (including rulings upon all motions or objections), together with seven

copies of a brief in support of said exceptions and immediately upon such filing copies shall be served on each of the other parties; and any party may, within the same period, file seven copies of a brief in support of the intermediate report and recommended order. * * *

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SEC. 102.47 *Filing of motion after transfer of case to Board.*—All motions filed after the case has been transferred to the Board pursuant to section 102.45 shall be filed with the Board in Washington, D. C., by transmitting seven copies thereof, together with an affidavit of service upon each of the parties. * * *

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